97-84110-7

Ross, Denman Waldo

Studies in the early history of institutions...Parts I - IV

Cambridge, Mass.

1880-1881

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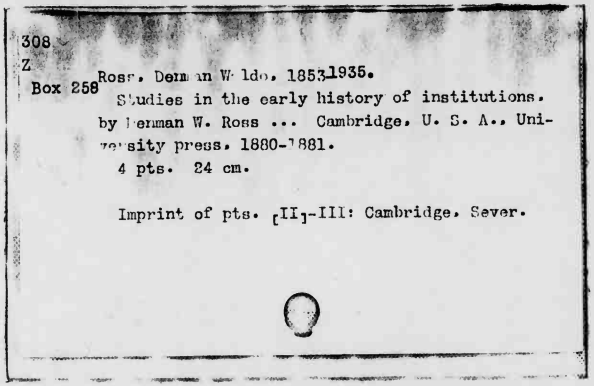
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Box 258 Ross, Herman Waldo, 1853-1935.
Studies in the early history of institutions.
by Herman W. Ross ... Cambridge, U. S. A., University press, 1880-1881.
4 pts. 24 cm.

Imprint of pts. [II]-III: Cambridge, Sever.

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TECHNICAL MICROFORM DATA

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TRACKING #: 23943, 23948, 23949, 25931

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Part I

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April 1881

308
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Box 258

STUDIES

IN THE

EARLY HISTORY OF INSTITUTIONS.

BY

DENMAN W. ROSS, PH. D.

THE THEORY OF PRIMITIVE COMMUNISM.

I.

CAMBRIDGE, MASS., U. S. A.:
CHARLES W. SEVER,
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1881.

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Munroe Smith
5.26.28

University Press:
John Wilson and Son, Cambridge.

Jan 17, 1930 DA

THE THEORY OF PRIMITIVE COMMUNISM.

The object of the following argument is to show, that the principle of individual property in land was fully recognized among the Germans at the time of the Folk-laws, the earliest period of clearly recorded history; that this principle was based upon a theory of inheritance in land; that, whenever a tract of land was occupied by a family or clan, it was at once divided among all the individuals of that family or clan; that they received their several allotments of land as inheritances for themselves and their descendants; that undivided land was regularly regarded as an undivided inheritance to be divided or appropriated whenever occasion should arise.

I. Individual Property in Land among the Franks.

We read in the Lex Salica (LIX. 5), the earliest in date of the German Folk-laws; that there was a right of inheritance in land, *de terra hereditas;* that it belonged to the male sex, *ad virilem sexum pertinebit;* that brothers got the land, as many as there were of them, *qui fratres fuerint tota terra perteneat.* We have the same law in the Lex Ripuaria (LVI. 4). The *hereditas aviatica* belonged to the male sex, *cum virilis sexus extiterit.* Women had no participation therein.

When the Franks settled anywhere, the first thing to be done was to make a distribution of inheritances. They had to decide where every man's inheritance should be, *ubi et ubi hereditas detur.* This we know from the Edict of Chilperic (c. a. 575. Monumenta, Leges, II. p. 10). The question arises how was this distribution of inheritances made? We know that inheritances were assigned here and there. We wish to know upon what principle the dis-

tribution was made. It appears that it was made by the king, with the advice of his chief men, and with the consent of the people. Compare the Edict of Chilperic above cited, the words *cum viris obtimatibus vel antrustionibus et omni populo*. It was made as Cæsar says, *quantum et quo loco visum est*, and, as Tacitus says, *secundum dignationem*. That the inheritances when once distributed became subject to division and subdivision according to the law, *qui fratres fuerint tota terra pertiniat*, among the descendants of those who first acquired them, admits of no controversy. In the old formulæ, CXXV. and CXXVI. in the collection of M. de Rosière, we have described the division of inheritances in land among brothers, and there are frequent allusions to such divisions in our early documents.

The question arises: if a man had no sons to inherit his land, what became of it? It appears from the third section of the Edict of Chilperic, above cited, that it went to his neighbors. The passage from which this inference is to be drawn reads as follows: — *Simili modo placuit atque convenit, ut si quicumque vicinos habens aut filios aut filias post obitum suum superstitutus fuerit, quamdiu filii advixerint terra habeant, sicut et lex Salica habet. Et si subito filios defuncti fuerint, filia simili modo accipiant terras ipsas, sicut et filii si vivi fuissent aut habuissent. Et si moritur, frater alter superstitutus fuerit, frater terras accipiant, non vicini.* Up to the time of the publication of this Edict the *vicini* seem to have had the right of inheritance, after the sons.

The question arises, what did the *vicini* do with the land which they inherited, in this way, from one of their number who died without sons? The answer to this question is found in the formula CXXVII. of de Rosière, where we have a division of land among co heirs, described as a *divisio vel exsequatio inter consortes de alode*. The *consortes*, having received an inheritance (*alod*), had it to divide among themselves. We read in the formula that each of the *consortes* received a certain portion of this inheritance; *unicuique ex ipsis justi debita portionem terminetur*. Each of the *consortes* had a right to a certain portion of the land, and could, we may be sure, demand a partition at any time. Compare the Additamentum of the Lex Burgundionum (I. 5): *Exœquationem inter consortes nullo tempore denegandam*. The question arises, how was this partition among *consortes* made? In answer to this question we

may read the Lex Wisigothorum X. I. 3: *Si plures fuerint in divisione consortes, quod a multis vel a melioribus juste constitutum est, a paucis vel deterioribus non convenit aliquantenus immutari.* This explains, perhaps, the *quantum-et-quo-loco-visum-est* division of Cæsar (Bello Gallico VI. 22), the *secundum-dignationem* division of Tacitus (Germania 26).

The land allotted to the individual in this way, his *debita portio*, was called his *sors* or *terra sortis titulo acquisita*. He received it as his own, and transmitted it to his descendants to be divided and subdivided among them. Compare Festus: *Sors patrimonium significat.* Then read the Lex Burgundiorum XIV. 5: *Portionem de hereditate patris accipiat, hoc est, de ea tantum terra quam pater sortis jure possidens mortis tempore dereliquit;* and ibid. LXXVIII.: *si pater cum filiis sortem suam diviserit*, etc. The land once divided was divided for good, and there were no subsequent redistributions of it, as many writers are inclined to maintain. We read in the Lex Wisigothorum XI. 8: *Quod a parentibus vel vicinis divisum est posteritas immutare non tenet.* In the Lex Ripuaria we read, LX. 2: *Si quis consortem suum quantulumcunque superpriserit, cum quindecim solidis restituat.* It was often necessary, among the Franks, for the King's *missus* to come down and divide the land among the *vicini* and *consortes*. See formula CXXVII. of de Rosière: *De divisione, ubi Rege accederit missus.*

It is evident, from all this, that the tenure and enjoyment of land among the Franks was in no respect communistic. The principle of individual property in land was fully recognized by them in the earliest period of their recorded history; and it rested upon a theory of inheritance in land.

Property in land was acquired by individuals in many different ways. It was acquired (1), by a distribution *quantum et quo loco visum est* and *secundum dignationem*. It was acquired (2), by right of inheritance. It was acquired (3), by adoption into an inheritance. Compare the formula CXXXIV. of de Rosière, entitled *Affatimum*, where an adoption into an inheritance in land is described. Compare also the Lex Ripuaria XLVIII.: *De homine qui sine heredibus moritur*, noting particularly the words *adoptare in hereditatem vel adfatimi*. The whole procedure of adoption is described under the title: *De adfathamire oc convenit observare*, in the Lex Salica (XLVI.).

Property in land was acquired (4), by gift or by purchase. The right of alienating property *ad libitum* was recognized by the Franks at a very early period of their history. As we read in a document of the year 709 (Hontheim, Historia Trevirensis Tom. I. p. 105): *Leges et jura sinunt, et convenientia Francorum est, ut de facultatibus suis quisque quod facere voluerit liberam habeat potestatem.* The procedure of adoption served, as a legal fiction, to introduce the practice of alienation by gift and by sale. *De affatomie dixerunt quod traditio fuisset* (Monumenta, Leges, II. p. 226). Compare the formula CLXVIII. of de Rosière, where we have a gift of land described as an *afftimum*. Then compare the document, No. 59, among the Merovingian Diplomata, a document of the year 691 (Monumenta, Dipl. I. p. 53), where we have a sale of land described in the terms *per fistuca achrammisse*. Land was acquired (5), by exchange. Compare the formulæ for exchanges, CCXCVIII., CCCXVIII., in the collection of de Rosière.

Property in land was acquired (6), by occupation and prescription. Compare the Lex Salica XLV.: De Migrantibus. Undisputed possession during a year was sufficient to make a good claim. The right of the *vicini* to prevent the *migrans* from acquiring the land of one of their number (*super alterum migrat*) is easily explained. If the owner of the land occupied by the *migrans* died without sons, the land went to the *vicini*, and each of them, as we have seen, got a share of it. Therefore they had the right, *unus vel aliqui*, to prevent the *migrans* from acquiring what might become an inheritance for themselves and their descendants. After the promulgation of the Edict of Chilperic and the *leges* referred to in the document cited from the Historia Trevirensis, however, the *vicini* could no longer prevent the owner of the land which the *migrans* had occupied, from adopting him into an inheritance in that land. They could not prevent him from giving or selling land to the *migrans*, or, if the *migrans* chose to commend himself to the owner of the land, the *vicini* could not prevent him from receiving the land as a grant in tenure. Compare the formula CLXI. of de Rosière: *Si aliquis servo suo, gasindo suo, aliquid concedere voluerit . . . . jure proprietario si ita convenit, aut sub redditus terre.* He would have then what is called in the Lombard Law (Rothar CCXXVIII.), a *munus in gasindio privati.* But we are digressing. Property in land was acquired by occupation and prescription. The early

documents constantly mention *comprehensiones*, *conquestae*, *capturae*, which are appropriations of land. For example, in document No. 64 of Lacomblet's Collection (Urkundenbuch des Niederrheins), we read: *Vendidimus, id est comprehensionem nostram in silva que vocatur Witherowald quam comprehensionem homines tui una nobiscum circuierunt et novis signis obfirmaverunt et accepimus a te pretium.* Property in land was acquired (7), by that curious procedure described in the Lex Salica LVIII. De Chrenecruda, where a murderer, having alienated all his movable property, and failing to pay his debt, makes over his land to his nearest kinsmen. They receive it from him, and with their movable property make up the sum required. The land was the last thing a man parted with. An inheritance in land was the last thing that a family surrendered.

Now, having found out how landed property was acquired, it will be worth while to learn what it consisted of. Among the Franks it consisted regularly of *villas* and portions of *villas*. In the formula CCXII. of de Rosière, we read about the *villam juris mei;* and in the formula CCXIII., we have described *portionem meam in villa.* We have mentioned in the Lex Salica the *villa aliena* (XLII. 5), the *orto alieno* (XXVII. 6). The *campo alieno* (ibid. 8), the *prato alieno* (ibid. 10), and the *silva aliena* (ibid. 18). In the formulæ (CCIII. of de Rosière, for example), we have under the head of lands (*terris*), held as individual property, *Campis, cultis et incultis, pratis, pascuis, vineis, silvis.* In the Lex Ripuaria we read (LX. 1): *Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparavit,* etc. In Ripuarian documents we have countless descriptions of landed property, of which the following are worth quoting: —

Lacomblet. Niederrheinisches Urkundenbuch. 2. . . . *de medietatem ei tradidi hereditatis mee eadem ratione in silva que dicitur Scæwald siue Suifterbant, exceptis agris qui inibi ante extirpati sunt a patribus aut ab hominibus nostris.* . . . 3 . . . *unum modicum curtile cum agris iii. in eadem villa et cum waterscapis, perviis, communiis pascuis* [undivided pasture land], *et dedi ei potestatem habere in silva que dicitur Sitroth* [undivided forest land]. . . . 4 . . . *terram proprii juris mei . . . id est totam terram illam quam Landulfus litus meus incolebat et proservichat et unum agrum quem Hildegerus ingenuus homo in meo beneficio ante habuit, cum omnibus que ad ipsum terram respi-*

tiunt, id est silvis, pratis, pascuis, perviis, aquis aquarumque decursibus, piscationibus. . . . 5 . . . *particulam hereditatis mee, id est, ipsum locum qui dicitur Ad Crucem cum pratis, qui ibi jacent in ripa fluvii Arnapi, ubi quondam avus meus Erminfridus casam habebat cum duobus agris qui separati sunt non longe ab eodem loco, dominationemque in silvam que dicitur Sitroth* [undivided forest land]. . . . 8 . . . *portionem hereditatis mee, id est, omne quod mihi jure hereditario legibus obvenit . . . in terra aratoria seu in pratis et in pascuis et omnem communionem mecum in silvam que dicitur Swiftarbant* [undivided forest land], *excepta una particula in illa prata que dicitur Blidgeringmad, quam mihi reservavi pro necessitatibus meis.* . . . 16 . . . *nos coheredes et comparticipes et consanguinei . . . tradidimus agrum hereditarii juris nostri* [undivided inheritance]. . . . 17 . . . *Idcirco placuit nobis coheredibus et comparticipibus in uno patrimonio . . . tradere . . . aliquam particulam hereditatis nostre.* . . . 21 *Dum omnibus vicinis suis non habetur incognitum qualiter Hembaldus filius Heribaldi tradidit . . . suam comprehensionem illam quam ipse Hembaldus in propria hereditate in communionem proximorum suorum* [note this] *proprio labore et adiutorio amicorum suorum legibus* [by right of allodial inheritance] *comprehendit et stirpavit.* . . . 22 . . . *curtile unum et duodecimam partem in silvam* [perhaps the donor's grandfather owned the whole and had four sons and the donor had two brothers] *qui dicitur Braclog cum pascuis et plena dominatione.* . . . 33 . . . *duas partes de illa foreste, . . . quicquid pater noster Amalricus nobis dimisit in hereditatem et in aliis duobus locis terra aratoria . . . unum ante illa porta orientale, alterum prope de ipsa foreste et inter illa dua loca habent fornales x.* . . .

I have taken pains to give here a number of records which have been used, by certain writers, to show the undivided land of the *vicini* was held by them in common to be enjoyed in common, *i. e.* communistically. It is evident, however, that the undivided land of the *vicini* was simply undivided property, to be divided or appropriated whenever occasion arose. It was regularly an undivided inheritance. Compare the following from the Codex Laureshamensis (record MCCXXXVI): *Ego in Dei nomine Suifferus dono ad sanctum Dei martyrem Nazarium, etc., in pago Wormat, in loco qui dicitur Baldolfisfelde, de illa silva communi, quantum jure hereditario ad me pertinere videtur.* Compare the Lex Burgundionum (Add. I., Tit. I. 6): *Silvarum, montium et pascuorum unicuique pro rata sup-*

petit esse communionem. Also Mohr, Codex Diplomaticus Cur-Raetiens No. 35 (680 in Wartmann's Urkundenbuch der Abtei Sanct Gallen): *Talem usum habuimus, qualem unus quisque liber homo de sua proprietate juste et legaliter decet habere, in campis, pascuis, silvis lignorumque succussionibus, atque porcorum pastu, pratis, viis, aquis aquarumque decursibus, piscationibus, exitibus et reditibus.*

II. Individual Property in Land among the Saxons.

We read in the Lex Saxonum (VII. 5): *Qui defunctus non filios, sed filias reliquerit, ad eas omnis hereditas pertineat, tutela vero earum fratri vel proximo paterni generis deputetur.* We read in the same Law (XVI. 1): *Qui terram suam occupatam ab altero dixerit, adhibitis idoneis testibus probet eam suam fuisse. Si occupator contradixerit campo* [i. e. by *pugna duorum*] *diiudicetur.* We read in the same Law (XV. 1): *Traditiones et venditiones omnes legitimae stabiles permaneant. Nulli liceat traditionem hereditatis suae facere praeter ad Ecclesiam, vel Regi, ut haeredem suum exhaeredem faciat* [this is the sole reason for the prohibition]; *nisi forte famis necessitate coactus, ut ab illo qui hoc acceperit sustentetur.* Compare the Lex Burgundionum LXXXIV. Descriptions of landed property among the Continental Saxons may be read in the Traditiones Fuldenses (ed. Dronke, Cap. 41): *Descriptiones eorum qui de Saxonia et Fresia Sancto Bonifacio sua predia obtulerunt.*

III. Individual Property in Land among the Frisians.

Two passages are worth citing from the Lex Frisonum. In Tit. XIX., De Parricidiis, we read: *Si quis patrem suum occiderit perdat hereditatem.* In Tit. XVII. 4, we have mentioned the *villam alterius.* We have records describing landed property among the Frisians, in the Traditiones Fuldenses, Cap. 7 and Cap. 41.

IV. Individual Property in Land among the Alamanni.

It appears from the eighty-fourth section of the Lex Alamannorum, where we have a dispute between two families or clans, *genealogiæ*, in regard to the boundaries of their respective lands, *contentio inter duas genealogias de termino terræ eorum*, a dispute which has to

be settled by battle, *pugna duorum*, that the families or clans of the Alamanni formed what we may call mark-communities. But it appears from Tit. LXXXVIII. of the Lex Alamannorum, where we have brothers dividing their paternal inheritance *portionem patris;* from Tit. LVII., where we see that the paternal inheritance, *hereditas paterna*, consisted of land as well as of movables; from Tit. I., where we have described the alienation of land by individuals; and from the documents in the collections of Zeuss (for Weissenburg), of Neugart (for Alemannia and Burgundia-Transjurana), of Mohr (Cur. Rhetia), and of Wartmann (for Sanct Gallen); that the principle of individual property in land was fully recognized within these communities, and that this principle of individual property was based upon a theory of inheritance. The bond of union between the individual members of these communities was municipal, rather than communistic.

When any tract of land was occupied by a family or clan, it was at once distributed among the members, and the share which the individual received was regarded by him as his inheritance, an inheritance to be transmitted to his descendants, to be divided and subdivided among them according to the law prescribing equal division among brothers, the law above cited. Undivided land was regarded as undivided property, regularly an undivided inheritance. Evidence of this lies in that document quoted above (p. 9), from Mohr's Codex Diplomaticus. The idea of ownership in common, *i. e.* communistic ownership, was unknown among the Alamanni, as it was unknown among the Franks, Saxons, and Frisians.

V. Individual Property in Land among the Bavarians.

It appears from the Lex Bainvariorum, Tit. XIV. 8: *Ut fratres hereditatem patris æqualiter dividant*, taken in connection with the early documents, of which we have, in Meichelbeck's Historia Frisingensis and in the Monumenta Boica, a great quantity, that the principle of individual property in land was as fully recognized among the Bavarians as it was among the Alamanni, and it rested, as among them, upon a theory of inheritance. It appears from the Lex, Tit. II., 20, taken in connection with a document of the year 750, in Meichelbeck (Tom. I., Pars I. p. 49), that the families or

clans formed what we have described as mark-communities. But we know that the tenure of land within these communities was based upon rights of property inherent in individuals. The right of inheritance in land has been already referred to. The right of alienating land by gift, sale, or exchange, was acquired at an early period and exercised very freely. Compare the Lex, Tit. XV. 2, where we read: *Si quis vendiderit possessionem suam alicui, terram cultam, non cultum, prata vel silvas, post acceptum pretium aut per chartam aut per testes comprobetur forma emptio.* Compare, also, ibid. 8: *Commutatio, hoc est quod cambias, talem qualem emptio habeat firmitatem.* The procedure for the vindication of a right of property in land is described in Tit. XI. 5, in Tit. XVI. and Tit. XVII. In any case, if the litigants failed to make a peaceable settlement of their dispute, it was settled (even when they were *commarchani*) by battle (*pugna duorum*). The evidence goes to show that undivided land was regarded by the Bavarians, as it was regarded by the Franks and the Alamanni, as undivided property to be divided or appropriated whenever occasion should arise. In a Salzburg record (Notitiæ Salzburgenses ed. Keinz, p. 33), we have the alienation of a *portionem venationis communem cum cohæredibus*, and the *cohæredes* are described as *illa gencalogia hominum de Albina.* In a Tyrol document we have certain undivided lands described as the *confinium conheredum* (Fontes Rerum Austriacarum Bd. XXXI., No. 20).

VI. Individual Property among the Angli, Werini, and Thuringians.

With regard to these branches of the Teutonic race I shall simply quote the Law of Inheritance, Tit. VI. of the Lex Angliorum Werinorum hoc est Thuringorum. It reads as follows: *Hereditatem defuncti filius non filia suscipiat. Si filium non habuit qui defunctus est, ad filiam pecunia et mancipia, terra vero ad proximum paternæ generationis consanguineum pertineat. . . .* 8. *Usque ad quintam generationem paterna generatio succedat. Post quintam autem, filia ex toto, sive de patris, sive matris parte, in hereditatem succedat, et tunc demum hereditas ad fusum a lancea transeat.*

Compare the Lombard Law of Inheritance, the Edictum Rotharis, CLIII. *Omnis parentela usque in septimum genuculum nume-*

retur, ut parens parenti per gradum et parentelam heres succedat. Sic tamen ut ille qui succedere vult, nominatim uniuscuiusque nomina parentum suorum antecessorum dicat. . . .

The hypothesis suggests itself that this archaic-looking law of inheritance in land originated among the Germans in remote prehistoric time; that it became obsolete and was forgotten by most branches of the race during the migrations; that it appears among the Angli, Werini, Thuringians, and Lombards, as a survival. I shall not attempt to verify this hypothesis. It does not, I think, admit of verification; it is, probably, a barrier hypothesis, an hypothesis standing upon the borders of the unknown. It may serve, however, as an hypothesis, to explain the existence of the theory of inheritance in land, the theory which we find common to all branches of the Teutonic race in the earliest period of clearly recorded history. The existence of this theory is a phenomenon which requires an explanation.

It has been shown, however, and I think conclusively, that the principle of individual property in land was fully recognized among the Germans at the time of the Folk-laws, the earliest period of clearly recorded history; that this principle was based upon a theory of inheritance in land; that whenever a tract of land was occupied by a family or clan, it was at once divided among all the individuals of that family or clan; that they received their several allotments of land as inheritances for themselves and their descendants; that undivided land was regularly regarded as an undivided inheritance, to be divided, or appropriated, whenever occasion should arise. And it must be evident that those who maintain that the earliest form of possession of land among the Germans was communistic, have a burden of proof upon their hands: and as to those who maintain that we have in the land-communities of mediæval and modern times (in the *Markgenossenschaften mit Feldgemeinschaft*) a survival of that primitive communism, they have a double burden; for they must show, in the first place, that the earliest form of possession of land among the Germans was communistic, and they must show, in the second place, that the communism of the later land-communities is a survival thereof.

The argument will be resumed hereafter at this point.

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Part [II]

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Feb. 6. 1930. DA/128

THE THEORY OF VILLAGE COMMUNITIES.

THE idea prevails that the earliest form of ownership in land was corporate, collective, or joint ownership; that separate ownership arose in consequence of the disentanglement of individual from collective rights; of the rights of the family from those of the tribe; of the rights of the individual from those of the family. The theory of village communities is based upon this idea. It is now universally accepted.

The theory has arisen in somewhat the following manner. Certain passages of Cæsar's Commentarii De Bello Gallico and the twenty-sixth chapter of Tacitus' Germania were read. The institution of joint tenure in the land communities of the middle ages was studied. It was then assumed that Cæsar and Tacitus describe joint ownership of land; and the problem arose, how was joint ownership changed to joint tenure. This problem, now of many years' standing, has not been solved. Its conditions, however, are accepted without hesitation or doubt. Men were free in the time of Cæsar and Tacitus, and held land in joint ownership. The same men were unfree in the tenth century and held land in joint tenure. How, therefore, was joint ownership changed to joint tenure?

Then there was a discovery in the East, in India, of free village communities like those of the West among the Germans in Tacitus' time. To be sure the land of the Indian villages is not held in joint ownership, but in ancestral shares. In early times, however, it must have been held in joint ownership; for what was an institution among the Germans in Tacitus' time must have been an institution among their kindred in India. So it has been argued;

and who can deny the force of the argument of evolution as applied to the growth of institutions?

Then there was a discovery in the West. There were village communities in Ireland in early times. They are described in early laws and other records. To be sure the land in these communities was held in ancestral shares. In so far as it was held in ownership at all, it was held in absolute and separate ownership. But what was an institution among the Germans in Tacitus' time, what was an institution not long ago among Aryan peoples in India, must have been an institution among the ancient Irish, their kindred. So it has been argued.

Then was discovered at last the very thing itself, the real village community, the community of Tacitus' Germany, of *pre-present* India, of prehistoric Ireland; a village community in which the land is periodically redistributed among the members, — the Russian *mir*. To be sure all the historians agree that the *mir* is an institution dating from the end of the sixteenth century (1592); that it was in its origin a community of tenants, *adscripti glebæ*, not a community of owners. But is not the argument of evolution as applied to the growth of institutions strong enough to contradict and silence the historians of Russia, the students of a few and doubtful facts? When the general truth has been ascertained, particulars of truths may be disregarded. So it has been argued.

Then followed a general and conclusive consideration. The cultivation and use of land in open fields upon co-operative principles is a fact sufficient in itself to show that land was held in joint ownership in early times; for now in the nineteenth century men are not educated up to the point of understanding and forbearance which is a condition of successful co-operation with absolute property. Can we believe for a moment that the archaic intellect was capable of seeing the advantages and understanding the principles of co-operation which have been discovered and laid down by modern economists with so much wisdom and learning? So it has been argued, and the force of the argument has not been denied.

However, there is that primary assumption that Cæsar and Tacitus describe joint ownership of land: and there are those facts; 1, that the land of the Indian villages is held in ancestral shares; 2, that the land of the ancient Irish communities was held in ancestral shares; 3, that the origin of the Russian *mir* has been placed by competent historians in the sixteenth century of our era. The force and significance of these facts has not been denied, except by the argument of evolution as applied to the growth of institutions; which argument, in this case, is based upon the above primary assumption that Cæsar and Tacitus describe joint ownership of land.

The following argument is calculated to show: 1, that joint ownership of land was unknown among the Germans in the fifth and following centuries; 2, that it must have been unknown in the time of Cæsar and Tacitus; that it is not described by them; 3, that the law of allodial inheritance, equal division of land among sons, is common to all branches of the Teutonic race; 4, that it must have been the law of that race before it was separated into branches; 5, that the law of equal division of land among sons contradicts the theory of village communities with joint ownership of land. The argument will consist of extracts from and references to the original sources, early laws, formulæ, and documents; interspersed with such brief comment or explanation as seems needed.

The law of allodial inheritance among the Salian Franks.

1. Lex Salica. LIX. 5. De terra vero nulla in muliere hereditas non pertinebit sed ad virilem sexum qui fratres fuerint, tota terra perteneat.

Division among brothers and co-heirs.

2. Formula (Rosière, CXXVI). Pactum divisiones inter fratres, id sunt illi et illi, heredes illui et illei quondam, qualiter se de alote eorum dividere vel exequare deberent, quod ita et fecerunt. . . . .

3. Formula (Rosière, CXXV). In Dei nomen. placuit adque convenit inter illus et illus germanus ut inter se de res eorum dividere debuerunt, quod ita et fecerunt. Accipit illi, hoc est casa cum omni circumcincto illa, seu et mancipia, vel mobile et inmobile quem in ipsa casa esse viditur, vel vinias, silvas et prata quantumcumque in ipsa casa aspicere viditur, totum et ad integrum. Et in contra accipit germanus suos illi alio locello illo cum omne rem ad se pertinentis . . . et hec paccio divisionis omni tempore firma permaneat.

4. Formula (Rosière, CXXVII). Dum et divisio vel exsequatio

inter illum et illum seu consortes eorum de alode lui aut de agro illo cælebrare debetur . . .

The inheritance consists of *villas* or portions of *villas*.

5. Formula (Rosière, CCXII). . . . . villam juris mei nuncupantem illam, sitam in pago illo, in condita illa, cum terris, ædificiis, accolabus, mancipiis, libertis, viniis, silvis, pratis, pascuis, aquis aquarumve decursibus, mobilibus et immobilibus, cum omnibus appendicuis suisque adiccentiis, sicut a me præsenti tempore videtur esse possessum.

6. Formula (Rosière, CCXIII). . . . portionem meam in villa nuncupante illa in pago illo, quicquid ibidem ad præseus tam de alode parentum vel de qualibet adtractu possidere videor, totum et ad integrum . . . .

7. Formula (Rosière, CCIII). . . . porciones meas in loco nuncupantes illo, sitas in pago illo, que mihi tam de alode quam de conparato vel de quacumquelibet adtracto advenit vel advenire potest legibus in supra memorata loca, tam terris, domibus, edificiis, mancipiis, libertis, acolabus, merita acolanorum, vineis, silvis, pratis, pascuis, campis, cultis et incultis, aquis aquarumve decursibus, movilibus et immovilibus, cum omnis adgecentiis et adpendiciis vel colonicis ad se pertinentibus, cum omni integritate vel superposito, quicquid dici aut nominare potest, in supra memoratus pagos vel ubiquæ de supradictas porcionibus tenere visus sum, totum et ad integrum. . . . .

These *villas* are manors under allodial lordship, subject to division and subdivision according to the law of allodial inheritance.

8. Lex Salica. XLII. 5. . . . villam alienam.

9. Lex Salica. Capitula VII. 9. . . . villam alterius.

10. Lex Salica. XXVII. 6. . . . orto alieno. . . . 8. . . . campo alieno. . . . 10. . . . . prato alieno. . . . 18. . . . silva aliena. . . .

Documents describing allodial property.

11. Guérard. Cartulaire de St. Bertin. III. . . . dono vobis omnem rem portionis hereditatis meæ in pago Toroanense . . . villam proprietatis meæ nuncupante Sitdiu, supra fluvium Agniona, cum omni merito suo, vel adjacentiis seu aspicientiis ipsius villæ. Hæc sunt: villa Magnigeleca, Wiciaco, Tatinga villa, Amneio, Masto, Fabricinio, Losantanas, et Ad Fundenis seu Malros, Alciaco, Laudardiaca villa, Franciliaco, cum omni merito

eorum ; cum domibus, ædificiis, terris cultis et incultis ; mansiones cum silvis, pratis, pascuis, aquis aquarumve decursibus. . . . XIV. . . . villas ipsius monasterii quicquid præsenti tempore possidebant, aut adhuc inantea, ex munere regum, vel collato populi [note collato populi]. . . . XVIII. . . . Constat me non imaginario jure, sed plenissima voluntate, vobis vendidisse, et ita vendidi, tradidisse, et ita tradidi, de præsente, hoc est omnem rem portionis meæ in loco nuncupante Rumliaco, in pago Taruanense, quam de parte filii mei Chardeberti quondam, ex luctuosa hereditate mihi obvenit: id est cum terris, domibus, edificiis, mancipiis, silvis, pratis, pascuis, aquis aquarumve decursibus. . . .

The theory of joint ownership of land is not consistent with the law of allodial inheritance, because joint ownership involves periodic or occasional redistribution, and every redistribution would involve a breach of the law. For example, if two brothers had three sons, the inheritance of one of them would be double that of either of the other two. By redistribution, the larger inheritance would be diminished, and the law of inheritance by which it was acquired would be broken.

If it had been the custom in prehistoric time to redistribute the land of the *villa* once in ten, twenty, or thirty years, or even within the period of a lifetime ; how could the law of allodial inheritance, which we find in the earliest records, have arisen ?

Right of the allodial proprietor to remove himself from his kindred, taking his allodial property with him ; so that his kindred have no further right of inheritance from him nor he from them.

12. Lex Salica. LX. De eum qui se de parentilla tollere vult. 1. In mallo ante thunginum ambulare debet et ibi tres fustis alninus super caput suum frangere debet. Et illos per quattuor partes in malo jactare debet et ibi dicere debet, quod juramento et de hereditatem et totam rationem illorum se tollat. 2. Et sic postea aliquis de suis parentibus aut occidatur aut moriatur, nulla ad eum nec hereditas nec compositio perteneat sed hereditatem ipsius fiscus adquirat.

13. The Laws of Athelstan. 8. . . . If any landless man should become a follower in another shire and again seek his kinsfolk, they may harbor him if they will be responsible for him.

In the Lex Salica it is assumed that he who withdraws from his kinsfolk has land, *hereditas*. But compare

14. Domesday 1. p. 172. . . . si ita liber homo est ut habeat socam suam et sacam et cum terra sua possit ire quo voluerit.

Right of the allodial proprietor to alienate the whole or part of his allodial property to a stranger; *hominem qui ei non perteneat.*

15. Lex Salica XLVI. De hac famirem. 1. Hoc convenit observare ut tunginus aut centenarius malo indicant et scutum in illo mallo habere debent et tres homines [? sacebarones, sacam et socam habentes] tres causas demandare debent. Postea requirent hominem qui ei non perteneat et sic fistucam in laisum jactet. Et ipse in cui laisum fistucam jactavit, de fortuna sua dicat verbum quantum voluerit aut totam fortunam suam cui voluerit dare. Ipse in cujus laisum fistucam jactavit, In casa ipsius manere debet. Et hospites tres vel amplius collegere debet et de facultatem quantum ei creditum est in potestatem suam habere debet. Et postea ipse cui isto creditum est, ista omnia cum testibus collectis agere debet. Postea aut ante rege aut in mallo illi cui fortuna sua deportavit redere debet et accipiat fistucam in mallo ipso. Ante XII. menses quos heredes appelavit in laisum jactet; nec minus, nec majus, nisi quantum ei creditum est.

This is alienation by adoption. Compare

16. Lex Ripuaria. XLVIII. . . . adoptare in hereditatem vel adfatimi per scripturarum seriem seu per traditionem et testibus adhibitis.

We have the *traditio et testibus adhibitis* described in the above passage of Lex Salica (15). In the following formula (17) we have the *traditio per scripturarum seriem.*

17. Formula (Rosière, CXVIII). Si quis in loco filii aliquem adoptare voluerit. . . . Dono igitur tibi omnes res proprietatis meæ quascumque de parte praterna seu de materna adquisisse visus sum, in pago illo, in loco nuncupante illo, hoc est mansos tantos cum ædificiis super positis, curtiferis cum aquarum ausibus, cum terris, silvis, campis, pratis, pascuis, adiacentiis seu et mancipiis ibidem commanentibus. . . .

Right of the allodial proprietor to give land to his vassal or slave. This would be a grant of tenure.

18. Formula (Rosière, CLXI). Quia si aliquis servo suo, gasindo suo, aliquid concedere voluerit. . . . manso illo, infra termino villa nostra illa, cum omni adjacentia ad ipso locello aut mansello aspicientem, terris, domibus, mancipiis, vineis, pratella,

silvola vel reliquis beneficiis ibidem aspicientibus: ita ut ab hoc die ipso jure proprietario, si ita convenit, aut sub reditus terræ, in tua revoces potestate. . . . Compare

19. Edictum Rotharis (Lombard law) CCXXVIII. . . . Nam quantum de rebus benefactoris sui per donum habuerit, si eas non obligaverit, ad ipsum patronum aut heredes revertantur. Et si aliquid in gasindio Ducis, aut privatorum hominum obsequio donum vel munus conquisierit, res ad donatorem revertantur.

In alias vero res [res obligatas] sicut dictum est, si heredes non dereliquerit, aut se vivo non judicaverit, patronus succedat, sicut parenti suo.

The vassal or slave might hold land with right of inheritance and alienation, but it was always a tenure of land, not ownership of it, *jus in re*, not *dominium*. The vassal gave up all rights of ownership, *dominium*, by the act of commendation. The slave lost his with his liberty, or his progenitors lost it.

Acquisition of allodial property by occupation and undisputed possession during one year.

20. Dronke. Codex Diplomaticus Fuldensis. 266. . . . unam capturam cum terris, pratis, campis, silvis, aquis, aquarumue decursibus. . . .

21. Lex Salica. XLV. De migrantibus. 1. Si quis super alterum in villa migrare voluerit, si unus vel aliqui de ipsis qui in villa consistunt, eum suscipere voluerit, si vel unus exteterit qui contradicat migranti ibidem, licentiam non habebit. . . . . 3. Si vero quis migraverit et infra XII. menses nullus testatus fuerit, securus sicut et alii vicini maneat.

The right of the *vicini* to prevent the occupation and acquisition of allodial property in the villa by the *migrans* is no indication that the *vicini* held the land of the *villa* in joint ownership. According to the law of allodial inheritance (equal division of paternal land among sons) neighbors were regularly kinsmen, and might, as such, become heirs one of another. It was in view of this fact that the *vicini* could prevent the stranger from acquiring allodial property in the *villa* by adverse possession. They could not, however, prevent the adoption of the *migrans* by any one of their number (compare 15, 16, and 17), nor could they prevent the *migrans*, as vassal or slave of one of their number, from receiving a tenure of allodial property in the villa (compare 18 and 19), nor

could they prevent any one of their number from selling some or all of his land to the *migrans* if he chose to do so (compare XVIII under 11).

22. Formula (Rosière, CCLXVIII). Vinditio de villa.

23. Formula (Rosière, CCLXXIV). . . . Constat me, non inmagenario jure nec nullo coagente imperium, sed propria voluntatis mei arbitrio, tibi vendere, quod ita et vendidi tibi, a die præsente, bunuaria tanta de terra arabili, in loco noncupante illo, quod est in pago illo, quem de parte parentum meorum, tam de alode quam et de comparato, vel de qualibet atracto ad me legibus obvenit; hoc est de uno latus terra illui et de alio latus illui, et de uno vero fronte terræ illui et de alio vero fronte pervio publico. Et accipi a tibi in precio taxato pro hoc, iuxta quod mihi bene conplacuit vel conventum fuit, solidos tantos. . . .

Fancy any one acquiring land by gift or purchase, and finding it next day merged with that of neighboring proprietors for redistribution! We must not forget that joint ownership involves periodic or occasional redistribution.

The opening phrase of the law *de migrantibus* (21) shows that every part of the village domain had its proprietor. What did not belong to one of the *vicini* belonged to another.

The law of allodial inheritance among the Ripuarian Franks.

24. Lex Ripuaria. LVI. 4. Sed cum virilis sexus extiterit, femina in hereditatem aviaticam non succedat.

A woman being under tutelage, *in mundeburde vel defensione*, could only hold a tenure of land *jus in re*. She could not hold *dominium*. With respect to property she stood in the same position as the vassal. He had *jus in re*, no *dominium*. The *hereditas aviatica* refers to *dominium*. Compare Festus; Heres apud antiquos pro domino ponebatur.

The right of allodial inheritance vindicated by battle of two. This indicates *dominium* of course.

25. Lex Ripuaria. LXVII. 5. Si quis pro hereditate vel pro ingenuitate certare cœperit. . . .

Documents describing allodial property.

26. Lacomblet. Niederrheinisches Urkundenbuch. 2. . . . de medietatem ei tradidi hereditatis mee eadem ratione in silva que dicitur *Seœwald* siue *Suifterbant*, exceptis agris qui inibi ante extirpati sunt a patribus aut ab hominibus nostris. . . . 3 . . . unum

modicum curtile cum agris III in eadem villa et cum waterscapis, perviis, communiis pascuis [? undivided inheritance], et dedi ei potestatem habere in silva que dicitur *Sitroth* [? undivided inheritance]. . . . 4 . . . terram proprii juris mei . . . id est totam terram illam quam Landulfus litus meus incolebat et proserviebat et unum agrum quem Hildegerus ingenuus homo in meo beneficio ante habuit, cum omnibus que ad ipsam terram respitiunt, id est silvis, pratis, pascuis, perviis, aquis aquarumque decursibus, piscationibus. . . . 5 . . . particulam hereditatis mee, id est, ipsum locum qui dicitur *Ad Crucem* cum pratis, qui ibi jacent in ripa fluvii Arnapi, ubi quondam avus meus Erminfridus casam habebat cum duobus agris qui separati sunt non longe ab eodem loco, dominationemque in silvam que dicitur *Sitroth* [? undivided inheritance. Compare document 3 above] . . . 8 . . . portionem hereditatis mee, id est, omne quod mihi jure hereditario legibus obvenit . . . in terra aratoria seu in pratis et in pascuis et omnem communionem mecum [? undivided inheritance] in silvam que dicitur *Suiftarbant* [compare document 2 above], excepta una particula in illa prata que dicitur *Blidgeringmad*, quam mihi reservavi pro necessitatibus meis. . . . 16 . . . nos coheredes et conparticipes et consanguinei . . . tradidimus agrum hereditarii juris nostri [undivided inheritance]. . . . 17 . . . Idcirco placuit nobis coheredibus et conparticipibus in uno patrimonio . . . tradere . . . aliquam particulam hereditatis nostre. . . . 21 Dum omnibus vicinis suis non habetur incognitum qualiter Hembaldus filius Heribaldi tradidit . . . suam comprehensionem illam quam ipse Hembaldus in propria hereditate in communionem proximorum suorum [this is conclusive] proprio labore et adiutorio amicorum suorum legibus [by right of allodial inheritance] comprehendit et stirpavit. . . . 22 . . . curtile unum et duodecimam partem in silvam [perhaps the donor's grandfather owned the whole and had four sons and the donor had two brothers] qui dicitur *Braclog* cum pascuis et plena dominatione. . . . 29 . . . vendidi proprietatis mee . . . in terra aribili terra et silva quasi jornales VI. et accepi a te pretio. . . . 33 . . . duas partes de illa foreste, . . . quicquid pater noster Amalricus nobis dimisit in hereditatem et in aliis duobus locis terra aratoria . . . unum ante illa porta orientale, alterum prope de ipsa foreste et inter illa dua loca habent jornales X. . . . 34 . . . vendidi res meas proprias . . . jornales

IIII. et habent de ambos latus terra Frithuric de uno fronte terra Lantbert, de alio fronte vero, terra ipsius emptore. . . . 39 . . . jornale uno de terra in villa nuncupante *Witi* et cum eo medietatem de silva, quicquid mihi in ipsa villa, jure paterno advenit. . . . 61 . . . terram XX. animalium et dimidiam unius [amusing issue of the law of allodial inheritance]. . . . 64 . . . vendidimus, id est comprehensionem nostram in silva que vocatur *Witherowald* quam comprehensionem hominc tui una nobis cum circuierunt et novis signis obfirmaverunt et accepimus a te pretium pro ea. . . .

I will refer the reader to the following documents.

27. Beyer. Urkundenbuch der mittelrheinischen Territorien. 6. 8. 13. 14. 19. 25. 30. 32. 39. 41.

28. Hontheim. Historia Trevirensis. XXVII. XXIX. XXXII. XXXV. XXXIX. XLI. XLVII.

29. Codex Laureshamensis. X. XI. XII. XIII. XV. XXXIII. XXXIV.

A few more extracts may be made from —

30. Dronke. Traditiones Fuldenses. Cap. 6. Discriptiones eorum qui de Hassia et Loganahe, Angergowe et Lutringia et Vestfalia, sco. Bonifacio tradiderunt bona sua. 2 . . . . quicquid proprietatis habuit in pratis, agris, silvis domibus, familiis et prolibus suis. 21 . . . . lidum unum cum omnibus que ad eum spectant et cum LXX jugeribus terre culte . . . 25 . . . unam capturam . . . 33 . . . proprietates suas in Teggenbach, idem partem capture et silvam cum agris, pratis, campis, domibus . . . 38 . . . mansum unum et XL jugera de terra arabili et prata ad XX carradas de feno . . . 58 . . . quicquid in ipsa marca proprietatis habuerunt. 67 . . . unam holzmarcham et prata ad III carradas feni. 81 . . . unam videlicet capturam quam fluvius Felteruccha transmeat. 94 . . . hubam I et areas II et de prato XXX porcorum valens. 104 . . . XII jugera et ambitum unum [compare document 64 under 26] de silva cum agris et pratis. 112 . . . XXX jugera in singulis locis . . . 124 . . . arcam in latitudine X virgarum et in longitudine CXXVIII.

It must be remembered that the above alienations of allodial property to St. Boniface were in many, if not in most cases, made by converts to Christianity.

It appears from these documents that the *hereditas aviatica* consisted of *villas* or portions of *villas*. Compare —

31. Lex Ripuaria. LX. 1. Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparavit et testamentum accipere non potuerit, si mediocris res est cum sex testibus, et si parva cum tribus, quod si magna cum duodecem ad locum traditionis, cum totidem numero pueris accedat, et sic eis præsentibus pretium tradat et possessionem accipiat et unicuique de parvulis alapas donet et torqueat auriculas, ut ei in post modum testimonium præbeant. . . .

The law of allodial inheritance among the Alamanni.

32. Lex Alamannorum. LXXXVIII. Ut fratres post mortem patris eorum hereditatem non dissipent antequam dividant eam.

Documents describing allodial property.

33. Wartmann. Urkundenbuch der Abtei Sanct Gallen. 2. 3. 4. 5. 7. 9. 12. 13. 14. 21. 24. 38. 49. 59. 60. 64. 67. 69. 72. 73. 83. 88. 107. 108. 110. 126. 142. 146. 214.

As these Sanct Gallen documents resemble many already quoted, and are rather formal in character, I will give references simply. I will make some extracts, however, from the early and very interesting records of the monastery Weissenburg in Alsace.

34. Zeuss. Traditiones Wizenburgenses. I . . . hobas III et mancipia super commanentes . . . homines qui super ipsam terram videntur deservire; hoc est, tam mansis, domibus, edificiis, mancipiis, acolabus, campis, pratis, vineis, silvis, pascuis, aquis aquarumve decursibus, quicquid in ipsa fine visus sum habere . . . IV. . . . silva ibidem mihi aspicientem ad porcos crassare plus minus XV. . . . V. . . . X jornales de terra aratoria et prato ubi potest annis singulis plus minus V carra de feno colligere . . . . VII. . . . de terra culturali XX jornales in campum unum juntos et est terminata ab uno latere habet Suaidemundus et ab alio latere habet Ratwino. . . . X. . . . res meas quod in villa Burghaime pater meus Adalbertus condam mihi moriens dereliquid et ego contra germano meo Hebrohardo in porcionem recipi et ad me pervenit, casis, casalibus, terris, pratis, silvis pascuis. . . . XIV. . . . villas [nine of them] . . . de genitore meo . . . XVII. . . . . villas juris nostri [four of them] . . . XXI. . . . silva sicut ego ibidem habui . . . XXXVII. . . . quantumcumque genitor meus Raginliodus mihi moriens dereliquid, mea portione, tam terris, mansis, casis, campis, pratis, pascuis, silvis, aquis. . . . LII. . . . hæc omnia sicut jam diximus tam de aviatico, quam de

paterno, sive de materno, sive de comparato, vel de quacumque libet adtractu. . . . LIII . . . excepto illa silva quod ego mea uxore in lib. dote condonavi. . . . LXIX. . . . tres partes de illa marca silvatica, portione videlicit sua. . . . LXXX. . . . midietatem de illa silva. . . . C. . . . omnia quicquid conquirere potui, aut conquestum visus sum habere [acquisition of allodial property by adverse possession]. . . . CIII. . . . quicquid filius meus Radolphus mihi moriens dereliquid, vel quicquid ibidem ad præsens possidere videor, tam de alode parentum vel de qualibet adtractu. . . . CLIX. . . . villas juris nostri . . . una cum basilica ad illas villas aspicientes, cum terris. . . . CLXVII. . . . in Reni fluminis locum ad molinam legitimam, et in eodem loco molinam paratam. . . . CCVIII. . . . jornales XVI, forastum unum et portionem meam de illa harde. . . . CCXXIII. . . . porcione illa in Johannevillare quem nobis de avunculi nostri Culuchyrino ligybus obvenit. . . . CCXXX. . . . res meas in pago Faroinse, terra araturia in Cotinea Marca, campo uno; ipse campus de uno latus Frodoldus et sui consorte [? coheredes, conparticipes in patrimonio, compare numbers 16, 17, under 26], de alio latus et de ambas frontus Thudonius tenet. . . . CCXXXVI. . . . hoba una cum casa et scuria et cum terris, pratis, pascuis silvis, aquis aquarumque decursibus, sicut ad ipsa hoba pertinet et tres mensuras supra ad arare. . . .

Dispute between two families about the boundaries of their respective lands.

35. Lex Alamannorum. LXXXIV. Si qua contentio orta fuerit inter duas genealogias de termino terræ eorum, et unus dicit: Hic est noster terminus, alius revadit in alium locum, et dicit: Hic est noster terminus, ibi præsens sit Comes de plebe illa et ponet signum ubi iste voluerit, et ubi ille alius voluerit terminum, et girent ipsam contentionem. Postquam girata fuerit, veniant in medium et præsente Comite, tollant de ipsa terra quod Alamanni curffodi dicunt, et ramos de ipsis arboribus infigant in ipsam terram quam tollunt, et illæ genealogiæ quæ contendunt levent illam terram præsente Comite et commendent in sua manu: ille involvat in fanone et ponat sigillum, et commendet fideli manu usque ad statutum placitum. Tunc spondeant inter se pugnam duorum. Quando parati sunt ad pugnam, tunc ponant ipsam terram in medio et tangant ipsam cum spatis suis, cum quibus pugnare debent,

et testificentur Deum creatorem ut cujus sit justitia ipsius sit et victoria; et pugnent. Qualis de ipsis vicerit ipse possideat illam contentionem, et illi allii præsumptiosi quia proprietatem contradixerunt duodecim solidos componant.

This passage has been quoted as evidence of joint ownership of land; but it must be remembered that, according to the law of alodial inheritance above quoted (32), the land of the family, *genealogia*, would be the sum of the land owned by the members individually. If any of the land of the family was undivided, it was an undivided inheritance, not joint property.

36. Fontes Rerum Austriacarum. XXXI. 20. . . . confinium coheredum. . . .

As undivided inheritance, the *confinium coheredum* was divisible at any time among the *coheredes;* and the share of each was determined by the number of his father's sons, of his grandfather's sons, of his great-grandfather's sons, and so on back to the sons of the common progenitor. It was necessary simply to make *exæquationes* for each generation, beginning with the first. The enjoyment of undivided lands was in theory at least limited by the relative proportion of individual rights of inheritance and property. Compare

37. Lex Burgundionum. Additamentum Primum. I. 5. Agriquoque communis nullis terminis limitati, exæquationem inter consortes nullo tempore denegandam [between *Frodoldus et sui consorte* (CCXXX under 34). Compare also 4]. 6. Silvarum, montium et pascuorum unicuique pro rata suppetit esse communionem [*pro rata* refers to individual rights of inheritance or property].

38. Mohr. Codex Diplomaticus Cur-Rætiens. 35 (in Wartmann 680). . . . Talem usum habuimus, qualem unus quisque liber homo de sua proprietate juste et legaliter decet habere, in campis, pascuis, silvis lignorumque succissionibus, atque porcorum pastu, pratis, viis, aquis aquarumque decursibus, piscationibus, exitibus et reditibus.

Read the following document, and imagine the undivided land of the two brothers remaining an undivided inheritance among their descendants for six generations.

39. Wartmann. 186. Nos vero in Dei nomine Wago et Chadaloh, filii Perahtoldi. . . . tradimus . . . quedam loca . . . sicut in hodierna die a nobis possessa noscuntur, tam divisa inter nos, quam etiam ea que in commune adhuc habere videmur. . . .

Suppose that the amount of undivided land was one thousand *jurnales*. Devise a genealogical table, and divide and subdivide the thousand *jurnales* according to the law of allodial inheritance. It will be seen that the problem of *exæquatio inter consortes* or *communio pro rata* was a very easy one so long as the knowledge of genealogical relationship was preserved. A mass of evidence might be given to show that such knowledge was valued very highly and preserved very carefully by the Germans in early times. To be sure, appropriations of undivided land were constantly made, *capturæ* or *conquesta* in the documents (compare 25 and 33 under 30, and 2, 21, and 64 under 26, and C under 34). In these cases, if the right of possession was not contradicted by neighbors or kinsmen, *coheredes*, *conparticipes in patrimonio*, it was assumed that no more land had been appropriated than would have been acquired in a general division, *divisio vel exæquatio*. Indeed, it was unlawful to appropriate more than one's due share (share by right of allodial inheritance) of undivided land. Compare

40. Lex Ripuaria. LX. 2. Si quis consortem suum quantulumcunque superpriserit, cum quindecim solidis restituat.

The *consortes* were regularly *coheredes* (compare the formula 4).

The law of allodial inheritance among the Bavarians.

41. Lex Baiuvariorum. XIV. 8. Ut fratres hereditatem patris æqualiter dividant. . . .

Items of allodial property mentioned in the law.

42. Lex Baiuvariorum. I. 1. . . . villas, terram. . . . VIII. 12. . . . hortum alicuius. . . . XI. 3. . . . fines fundorum. . . . terminos alienos. . . . XII. 6. . . . messem vel pratum alterius. . . . XV. 2. Si quis vendiderit possessionem suam alicui, terram cultam, non cultam, prata, vel silvas. . . . XVI. 1. . . . agrum aut pratum vel exartum. . . . XXI. . . . alienum pomarium. . . . aliena nemora. . . . alterius silva. . . .

Concerning boundaries of allodial inheritance and property we must read —

43. Lex Baiuvariorum. XI. 5. Quotiens de commarchanis [note this word] contentio nascitur, ubi evidentia signa non apparent in arboribus, aut in montibus, nec in fluminibus, et iste dicit: Hucusque antecessores mei tenuerunt, et in alodem mihi reliquerunt, et ostendit secundum proprium arbitrium locum;

alter vero nihilominus in istius partem ingreditur, alium ostendit locum, secundum prioris verba, suum et suorum antecessorum semper fuisse usque in præsens asserit. Et si alia probatio nusquam invenire denoscitur, nec utriusque invasionem compensare voluerit, tunc spondeant invicem wehadinc quod dicimus, et in campiones non sorteantur, sed cui Deus fortiam dederit et victoriam ad ipsius partem designata pars, ut quærit, pertineat.

No stronger evidence can be given against joint ownership of land. The *dominium de terra* of the allodial proprietor cannot be more completely established. Compare

44. Lex Baiuvariorum. XVI.

45. Lex Baiuvariorum. XVII.

In both cases, as in 43, we have the right of allodial inheritance and property vindicated by battle of two (compare 25).

Documents describing allodial property.

46. Meichelbeck. Historia Frisingensis. I. p. 52. . . . rem propriam, quam genitor meus Swarzoth mihi in hereditatem reliquid. . . . casas, cortes, mancipias, servos, liberos, tributales, omnem cultam, incultam, campis, silvis, pratis, aquis, aquarum decurrentibus, mulinos, vineas, greges, jumenta vel quicquid ad ipsum confinium pertinebat . . . I will refer the reader to the Instrumenta. IV. V. VII. X. XII. XIII. XVIII. XXVIII. XXIX. XXXV.

47. Monumenta Boica. VII. Monumenta Scheftlarensia. III. X. XI.

All these documents have the same general character. The quantity of them is very great and their testimony perfectly concurrent.

The law of allodial inheritance among the Angli, Werini, and Thuringians.

48. Lex Angliorum et Werinorum, hoc est Thuringorum VI. 1. Hereditatem defuncti filius non filia suscipiat. Si filium non habuit qui defunctus est, ad filiam pecunia et mancipia, terra vero ad proximum paternæ generationis consanguineum pertineat. . . . 8. Usque ad quintam generationem paterna generatio succedat. Post quintam autem, filia ex toto, sive de patris, sive matris parte, in hereditatem succedat, et tunc demum hereditas ad fusum a lancea transeat.

When the inheritance comes at last to the woman, it is no longer associated with the spear. That is to say, it is no longer *dominium*, only *jus in re*. The *dominium* would be held by the man who held the woman in tutelage, *in mundeburde vel defensione*.

Documents describing allodial property among the Thuringians and Werini.

49. Dronke. Traditiones Fuldenses. Cap. 38 and Cap. 5. Compare

50. Jaffé. Monumenta Moguntina. Ex Othloni vita S. Bonifatii. p. 490. Exinde septum carpens iter et Thuringiam paragrans [sanctus Bonifacius, prædicando et baptizando], diligenter investigavit cujus ille locus esset, ubi visio tanta sibi apparuit. Compertoque, quod Hugo, qui dicebatur senior, illius loci possessor esset, petiit ab eo, ut sibi dare dignaretur. At ille, petita annuens, primus omnium Thuringorum hereditatem suam tradidit venerando præsuli. Deinde vero Albolt aliique plures contigua prædicto loco prædia tradiderunt.

In the same way St. Gall, when he found a place for his monastery, discovered that the land he wanted was owned by several persons. They made donation severally. (Compare the Ratperti Casus and Otmari Vita. Monumenta Germaniae. Scriptores. II. pp. 61, 62, 92.)

The law of allodial inheritance among the Saxons.

51. Lex Saxonum. VII. 5. Qui defunctus non filios, sed filias reliquerit, ad eas omnis hereditas pertineat, tutela vero earum, fratri vel proximo paterni generis deputetur.

The *dominium* would lie with the *frater* or *proximus paternæ generis* (compare above 48).

Vindication of allodial inheritance and property in land by battle of two. *pugna duorum*.

52. Lex Saxonum. XVI. Qui terram suam occupatam ab altero dixerit, adhibitis idoneis testibus, probat eam suam fuisse; si occupator contradixerit, campo dijudicetur.

Documents describing allodial property among the Frisians and Saxons.

53. Dronke. Traditiones Fuldenses. Cap. 41. Descriptiones eorum qui de Saxonia et Fresia sancto Bonifacio sua predia obtulerunt. 4. . . . XX villulis . . . 16 . . . XXX jugera et unum

lidum nomine Cuteo et silvam sicut alii lidi habere videntur XL jugerum. 29 . . . dimidiam partem capture que est circa fontem qui dicitur Magedobrunno . . . 31 . . . villas IIII. . . . 72 . . . predium meum terram scil. XXIIII boum arandam . . . 113 . . . proprietatem meam in loco Hericgibruhusen et in ceteris villis quicquid mihi amicus meus Gozleib dare commendavit tam in hubis quam in areis, silvis, pratis, domibus, familiis . . . mancipiorum cum prolibus eorum fere centum . . . Cap. 7. Descriptiones eorum qui de Fresia bona sco. Bonifacio tradiderunt. 20 . . . terram XXX duorum pecorum pascualem. Et in alio loco . . . terram XXVIII pecudum pascualem, in tercio loco . . . X pecudum pascua et insuper terram aratura suficientem ad hec, cum mancipiis et cultoribus agrorum XXX numero. 22. . . . quicquid in locis istis hereditatis vel proprietatis habeo . . . XX virgas de terra arabili . . . pascua XIII boum . . . 27 . . . XV boum terram . . . 28 . . . XXX boum terram. 29 . . . terram X boum sicut apud illos mos dicendi est, apud nos vero X jugera [this is interesting].

The law of allodial inheritance is wanting in the Lex Frisionum. Compare however Tit. XIX. De parricidiis.

The law of allodial inheritance among the Lombards.

54. Edictum Rotharis CLIII. Omnis parentela usque in septimum genuculum numeretur, ut parens parenti per gradum et parentelam heres succedat. Sic tamen ut ille qui succedere vult, nominatim uniuscuiusque nomina parentum suorum antecessorum dicat. . . .

55. Formula. Petre te appelat Martinus, quod tu tenes sibi malo ordine terram quæ jacet in loco tali. Ipsa terra de qua tu dicis, mea propria est de parte Dominicis parentis mei. Et tibi quid pertinet ad requirendum? De parte ipsius. Tunc interoga ipsum qui tenet, quomodo fuit suus parens. Marcoardus proavus suus fuit, consobrinus de proavo meo, et fuerunt in tertio gradu. Avus meus et avus illius in quarto. Pater meus et pater illius in quinto. Ego et ille in sexto. Interroga similiter illum qui pulsat. Avus meus et avus suus fuerunt fratres et fuerunt secundo gradu. Pater meus et mater sua in tertio. Ego et ille in quinto. Et cum fuerit nominata hæc parentela, interroga eum qui tenet, si potest probare quod plus proximus sit. Si non potest probare, probet ipse qui appellat. Et si ipse non protuerit, juret ipse qui ap-

pelatus est cum suis sacramentalibus, quod plus proximus sit, et habeat ipsam terram.

We have now learned what the law of allodial inheritance was, and we have learned that the inheritance conferred by this law consisted of property in land, *dominium de terra*. We have learned that the law of allodial inheritance was common to the Salian and Ripuarian Franks, the Alamanni, the Bavarians, the Angli, Werini, Thuringians, Saxons, and Lombards, in the earliest period of their recorded history. May we not then infer that it was the law of the Teutonic race before it had separated into branches, that is to say in prehistoric time? But it is said that Cæsar and Tacitus, in their account of the Germans, describe the institution of joint ownership of land which, as we have seen, is not consistent with the law of allodial inheritance. If this is so, we shall have to weigh the testimony of Cæsar and Tacitus against that of all the laws, formulæ, and documents we have been reading; and I am afraid that the testimony of Cæsar and Tacitus would count for very little. But first let us see what they say, — whether, indeed, they do describe the institution of joint ownership of land as is maintained. We will first read

56. Cæsar. De Bello Gallico. VI. 22 . . . magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum, et quo loco visum est, agri attribuunt, atque anno post alio transire cogunt.

57. Cæsar. De Bello Gallico. IV. 1. . . . neque longius anno remanere uno in loco incolendi caussa licet.

58. Horace. Carmina. III. XXIV. 14. Nec cultura placet longior annua [of the Getæ].

So far we have no evidence of joint ownership of land. Reading —

59. Cæsar. De Bello Gallico. VI. 22. . . . neque quisquam agri modum certum aut fines habet proprios [sed privati ac separati agri apud eos nihil est, in IV. 1].

We should say that there was no ownership at all, only adverse possession for a short time by groups of kinsmen. But let us read —

60. Tacitus. Germania. 26. Agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur; facilitatem partiendi camporum spatia præbent. Arva per annos mutant et superest ager.

Ab universis in vices is explained in —

61. Cæsar. De Bello Gallico. IV. 1. Hi [Suevi] centum pagos habere dicuntur, ex quibus quotannis singula milia armatorum bellandi caussa ex finibus educunt. Reliqui qui domi manserint, se atque illos alunt. Hi rursus invicem anno post in armis sunt; illi domi remanent. Sic neque agricultura, neque ratio atque usus belli intermittitur.

Compare —

62. Anglo-Saxon Chronicle. A. 894. King Alfred divided his forces, so that one half was constantly at home, the other half in the field.

There is no evidence of joint ownership of land in the phrase *ab universis in vices*. It remains for us to consider the meaning of *agros inter se secundum dignationem partiuntur*. Joint ownership implies equality; a *divisio secundum dignationem* implies inequality. Can we say that there is any evidence here of the institution of joint ownership of land?

It does not seem to me reasonable to base any theory of ownership or tenure of land upon the evidence either of the twenty-sixth chapter of the Germania or the above passages from Cæsar. The most we can infer is: 1, the temporary occupation of tracts of land by groups of kinsmen; 2, division of land among the members of these groups; *secundum dignationem;* 3, adverse possession by the individual of the land thus acquired.

Fortunately, however, we are not left in doubt as to the nature of the *divisio secundum dignationem*. The following passages occur in the law of the Visigoths.

63. Lex Wisigothorum. X. I. 1. Valeat semel facta divisio justa, ut nulla in post modum immutandi admittatur occasio. 2. Divisionem factam inter fratres, etiamsi sine scriptura, inter eos convenerit permanere jubemus; dummodo a testibus idoneis comprobetur et divisio ipsa plenam habeat firmitatem. 3. Si plures fuerint in divisione consortes, quod a multis vel a melioribus juste constitutum est, a paucis vel deterioribus non convenit aliquatenus immutari. . . . 5 . . . Qui placitum divisionis irruperit, et quamlibet partem alienæ portionis invaserit, tantum de suo quantum de alieno occupavit, amittat. . . . 8 . . . Sed quod a parentibus vel vicinis divisum est posteritas immutare non tenet.

Read again 56. The conclusion is inevitable. The *gentibus cognationibusque hominum, qui una coierunt* are the *consortes* and the *parentes vel vicini* of 63, and the territory assigned to them is their allodial inheritance. It is the *confinium coheredum* (compare 36). Compare —

64. Præceptum Bosonis Regis Burgundii. A. 887. (Du Cange, under Genealogia). . . . . alodium de nostris genealogiis propriis. . . . .

Reread 37, and in connection with it the following from a document among the records of Freising.

65. Meichelbeck. I. p. 49. . . . appetivi [Josephus episcopus] locum ad proprios heredes, quo vocatur Erichinga, et ibidem pro necessitate domos construxi, quia antea jam temporibus plurimis inculta atque deserta remansit, omnes autem possessores hujus loci prumptis viribus donantes atque tradentes. . . . Tasillo Dux Bajoarorum quicquid ad Feringas pertinebat pariter ipsis consentientibus, Alfrid cum fratribus suis et participibus eorum atque consortiis. Reliquas autem partes quicquid ad genealogiam quæ vocatur Fagana [compare Lex Baiuvariorum. II. 20] pertinebat, tradiderunt ipsi, id sunt: Ragino, Anulo, Wetti et Wurmhart et cuncti participes eorum, donantes . . . .

The *alodium de genealogia Fagana* would be a family inheritance divided or divisible among all the members according to the law of allodial inheritance. By reference to 54, the reader will see how easy it was at any time to determine the amount of land due to any member of a *genealogia* or *parentela*, by simple reference to the sons of common progenitors and the number of them, making *exæquationes* accordingly (compare remarks under 36).

If any doubt remains in the reader's mind whether *secundum dignationem*, which seems to refer to social rank, can refer to rights of inheritance and property, it will be removed by the following extracts from Anglo-Saxon sources: —

66. Anglo-Saxon Law of Wergilds. 9. If a *ceorl* be enriched so that he has five hides of his own land and any one slay him, let him be paid for with II. M. *thrimsas*. 10. If he be enriched so that he has a coat of mail, a helmet, and a gilded sword, and yet has not that land, he is *sithcund*.

67. Anglo-Saxon Law of Ranks. 2. If a *ceorl* thrive so that he has fully five hides of his own land, church and kitchen, bell-house and buhr-gate-seat, and duty in the king's hall, then he is of *thane*-right worthy. 5. And if a *thane* thrive so that he becomes an *eorl*, then is he of *eorl*-right worthy.

68. Historia Eliensis. II. 40. (Gale. Scriptores. XV. I). Habuit enim [Abbas Wlfricus] fratrem Gudmundum vocabulo, qui filiam præpotentis viri in matrimonium conjungi paraverat. Sed quoniam ille quadraginta hidarum terræ dominium minime obtineret, licet nobilis esset, inter proceres tunc numerari non potuit, eum puella repudiavit . . . .

The *divisio inter se secundum dignationem* described by Tacitus was the division of an *alodium de genealogia* among the members of a *genealogia* according to their several rights of allodial inheritance or property. The *alodium* was alotted to the *genealogia* (*gentibus cognationibusque hominum qui una coierunt*) *quantum et quo loco visum est* by the *magistratus ac principes;* and thus the law of allodial inheritance was fulfilled.

This brings me to the end of my labor. It has been shown: 1, that joint ownership of land was unknown among the Germans in the fifth and following centuries; 2, that it must have been unknown among them in the time of Cæsar and Tacitus; that it is not described by these writers; 3, that the law of allodial inheritance, equal division of land among sons, is common to all branches of the Teutonic race; 4, that it must have been the law of that race before it was separated into branches; 5, that the law of equal division of land among sons contradicts the theory of village communities with joint ownership of land. The result of further investigation will be given hereafter.

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THE THEORY OF VILLAGE COMMUNITIES.

I shall undertake, in the following essay, a critical examination of the Theory of Village Communities, as presented and recommended by its most eminent advocates, — G. L. von Maurer, Friedrich Thudichum, Prof. Nasse, M. de Laveleye, and Sir Henry Maine.

The works of Von Maurer and Thudichum are now antiquated, superseded in a great measure, and little read, even by students; but in view of the fact that these writers have contributed fundamental premises for the arguments of their successors in the field of Economic History I shall have to bring them into notice once more; and I think I cannot urge a plea for independent study and independent writing more effectively than by showing how the researches of Prof. Nasse, M. de Laveleye, and Sir Henry Maine have been affected by the unscientific arguments and the erroneous conclusions of their predecessors.

Von Maurer says at the beginning (p. 6 *et seq.*) of his "Einleitung zur Geschichte der Mark-, Hof-, Dorf-, und Stadt-Verfassung" (München, 1854), that in pre-historic and early times the Germans had their land in collective ownership. "Ungetheilter Gemeinschaft" is his phrase, and by it he means, as he afterwards explains (Einleitung, p. 144), "wirkliche Gemeinschaft des von den Genossen bewohnten Grund und Boden"; and he says of this "real communism" that it has persisted in parts of Germany, and, to a certain extent, also in other countries of Western Europe, from the earliest time to the present day. He gives us cases in illustration and support of this statement; and pretends to show by means of them how, within comparatively recent times, the

land of certain villages, in Germany and elsewhere, has been the common property of the villagers, precisely at it was in the time of Cæsar, — "zur Zeit Julius Cäsars." This is Von Maurer's theory in brief. It is the theory of his followers. Prof. Nasse, for example, says (Contemporary Review, 1871–72, p. 740 *et seq.*): "When the Germanic tribes first advanced from the life of wandering shepherds to dwelling in more settled habitations, they divided the land upon which they settled amongst the communities of which they were composed. . . . . Of the portions of land allotted to the separate communities, a part in each was divided off in which to build dwellings. . . . . The dwelling-places of a community were generally near together, and all surrounded by a village hedge. These enclosed dwelling-places were the only strictly private property of the Germanic land-owner, over which he had unlimited control. He had only the use of the rest of the land in common with other householders in the district. This was especially the case with the woodland and pasture; these were everywhere the undivided property of the whole community. . . . . The extent to which arable land was common is more doubtful. . . . . But the original state of things probably was that arable land was not held permanently as private property, but was from time to time re-distributed amongst the community, for temporary occupation, by lot." Our author then goes on to say, that "up to the most recent times there have been here and there districts in Germany in which an annual re-partition of all arable land took place. . . . . From time to time [p. 742] the land reverted to the state of common property, which indeed it only ceased to be during the time of actual cultivation."

According to Von Maurer, Prof. Nasse, and their followers, the earliest form of possession of land among the Germans was collective ownership involving re-distributions *per capita*. But where is the evidence to support this theory? The earliest account which we have of the Germans is that of Cæsar, and he says of them (B. G., IV. 1) that they did not remain in one place more than a year. Consequently they did not have any separate and private property in the land which they occupied for so short a time (B. G., IV. 1 and VI. 22). But as the Germans told Cæsar, and he tells us (B. G., VI. 22, near the end), if the people had ceased their wanderings, and settled down into quiet life, private property in land would probably have arisen, *possessiones*, and even great estates, *latos fines*. How these predictions came to pass ought to be well known to all students of the early and mediæval records. When we meet with the Franks, in the fifth century and afterwards, we find them a settled people. The land has been divided, and we have *possessiones* everywhere, and *latos fines* too. And what is true of the Franks is equally true of all other branches of the German people, as they emerge into the historical period; the Burgundians, Goths, Lombards, the Alamanni, the Bavarians, the Saxons, and the rest. I have collected the evidence to establish this general fact beyond controversy in the first of these series of studies.

Perhaps Von Maurer and his followers base their theory upon the account which Tacitus gives us of the Germans in his "Germania." But Tacitus tells us (Cap. 26) that the distributions of land were made, not *per capita*, but *secundum dignationem;* which would be according to individual rights. And when we inquire further upon what ground these individual rights could rest, we learn that they were rights of inheritance; for Tacitus tells us (Cap. 20) that there was a law of inheritance according to which wealth passed from father to sons, or, if there were no sons, to nearest kinsmen. The ownership of the land would be, accordingly, *per stirpes*, and not *per capita*. Nor is there anything in the words of Tacitus (Cap. 26), *arva per annos mutant, et superest ager*, inconsistent with this conclusion; for I find in a document by Sanct Gallen (Wartmann, No. 214) the alienation of property in *analies terris* (land occupied for cultivation in successive years, the *arva per annos culta* of Tacitus); and this property is described as having belonged to the donor's parents, *genitor* and *genetrix*. He had it from them by inheritance. So it is plain that although the Germans of Tacitus were constantly cultivating new fields, *arva*, they might for all that have distinct rights of inheritance and property therein. It does not therefore follow from the testimony of Tacitus that the Germans owned their land *per capita*, as is maintained by Von Maurer and his followers.

It will be urged, however, that we may infer from the *arva per annos mutant et superest ager*, that the *ager* minus the *arva* was the common property of the *Markgenossen*, and owned by them

per capita. Yes; but may we not as well infer that it was owned by them in ancestral shares, *per stirpes* or *jure hereditario?* Compare the following, from a document of the Codex Laureshamensis (MCCXXXVI.): *Ego in Dei nomine Suifferus dono ad sanctum Dei martyrem Nazarium etc. in pago Wormat. in loco qui dicitur Baldolfisfelde, de illa silva communi, quantum jure hereditario ad me pertinere videtur.* Many other passages in the early records could be adduced to show that the undivided land of the *Markgenossen*, the *ager*, was regarded by them as their undivided inheritance, the *confinium conheredum* (compare Study I., No. 36 *et seq.*); but my object here is simply to show that it does not follow from the *arva per annos mutant et superest ager* that the *ager* was owned by the *Markgenossen, per capita*. I wish to convince the reader that it does not follow from the testimony of Tacitus, any more than it follows from the testimony of Cæsar, that the Germans owned their land *per capita*, as is maintained by Von Maurer and his followers.

It must be evident that, even though my opponents will not allow that the words *secundum dignationem* have any reference to rights of inheritance, they must allow that this is a possible interpretation of them, especially as Tacitus mentions the existence of a law of inheritance governing the distribution and enjoyment of wealth. Even though my opponents will not allow that the *ager* and the *arva per annos culta* were owned and enjoyed *per stirpes*, they must grant that Tacitus says nothing to the contrary; and, of course, if it is possible that the Germans of Tacitus owned their land *per stirpes*, it cannot be maintained that they owned it *per capita*, unless this fact is established by the concurrent testimony of the later sources.

It may be urged that I reason too closely to the letter in interpreting the testimony of Cæsar and Tacitus, that I do not consider the general political, social, and economic conditions of the time. This may be so. I must admit that it is possible, even probable, that in the time of Tacitus and Cæsar wealth consisted principally, if not entirely, in slaves and stock (see Germania, chapters 25 and 26); that the distribution and enjoyment of land was, so to speak, supplementary thereto. I can readily believe that the arable land was allotted to each clansman *pro numero cultorum suorum*, — that is, he had as much as he and his dependents

and slaves could cultivate; that the pasture land was enjoyed in proportion to rights of property in grazing stock; *pro numero animalium*, as we might say. Undoubtedly there was plenty of land for everybody at that time, while the amount of capital in slaves and stock was comparatively limited. It may therefore be reasonably urged, that there was no occasion for precise and definite divisions of land; that every man had as much as he needed for himself and his people. I grant that this view is perfectly reasonable and tenable. Nevertheless, I maintain that the ownership of land was, *de jure* if not *de facto*, *per stirpes;* and in support of this thesis I have not only the *possessiones* and *latos fines* of Cæsar (see above, p. 5), but the law of inheritance and the words *secundum dignationem* in Tacitus; besides the concurrent testimony of the later sources to show that the law of inheritance governed above all things the distribution and enjoyment of land. Compare Lex Salica, de Alodis (LIX. 5); Rosière's Formulæ, CXXVI., CXXV., CXXVII., CCXII., CCXIII., CCIII.; Lex Salica, de Furtis Diversis (XXVII. 6, 8, 10, 18); Edictum Chlotarii II., Cap. 21 (*sylvas privatorum*); Capitulary of A. 813, Cap. 40 (*hereditatem in silva*); Lex Ripuaria, de Alodibus (LVI. 4); also in the same law the passage, de Traditionibus (LX. 1); Documents of St. Bertin (Guérard), Lower Rhine (Lacomblet), Middle Rhine (Beyer and Hontheim), Weissenburg (Zeuss), Lauresham (Codex Laureshamensis), Fulda (Dronke), Lex Alamannorum LXXXVIII. (*ut fratres hereditatem non dissipent antequam dividant eam*); Documents of Sanct Gallen (Wartmann); Lex Baiuvariorum XIV. 8, XI. 3, XII. 6, XV. 2, XVI. 1, XXI., XI. 5, XVI., XVII. (text of Walter's Corpus Juris Germanici); Documents of Freising (Meichelbeck), of Salzburg (Keinz); Lex Angliorum, Werinorum, Thuringorum, VI., de Alodibus (very important); Lex Saxonum XVI. de Terra Aliena Invasa, XV. de Traditionibus, VII. de Haeredibus; Documents for Thuringia and Saxonia, in the Fulda collection (Dronke's Traditiones); Edictum Rotharis, CLIII. (text of Walter's Corpus Juris Germanici), and Formulæ appended to the same law. This list of references might be indefinitely extended, but it is not my purpose here, as in Study I., to establish my own case, so much as to destroy that of my opponents. I hope that the reader is at this point convinced that the reasoning of Von Maurer and his followers is, in

so far as it is based upon the testimony of Cæsar and Tacitus, unscientific and untrustworthy. I will now proceed to give some examples of their reasoning out of the later sources, the laws, formulæ, and documents.

Von Maurer says of his Teutonic village (Einleitung, p. 144): "Die Grundlage dieser Genossenschaft ist wirkliche Gemeinschaft des von den Genossen bewohnten Grund und Boden gewesen. Sie war eine eigentliche Feldgemeinschaft, eine *Communio* oder *Communitas*." There is a reference in the foot-note to Title XIII. of the Burgundian law, and the words *remota hospitis communione* are quoted; but the word *possideat* after *communione* is omitted. The passage referred to has no reference whatever to the mark-community. It has reference to the division of land, half and half, between the Gallo-Roman proprietors and their Burgundian *hospites*. Compare Tit. XXXI., where it is written, *Inter Burgundiones et Romanos id censuimus observandum, ut quicunque in communi campo, nullo contradicente, vineam fortasse plantaverit similem campum illi restituat, in cujus campo vineam posuit*. Von Maurer omits to tell us all this; and quoting the words of Title XIII., *remota hospitis communione*, without the word *possideat*, calls it evidence of "eigentliche Feldgemeinschaft." Then he quotes the Additamentum of the same law (I. 1), thus: *sylvarum montium et pascuorum . . . communionem*, omitting the words *unicuique pro rata suppetit esse*. He also omits the preceding passage of the law, in which it is written that a division of common lands may be made at any time, which is evidence to show that the common lands were simply undivided property. Compare Study I. (pp. 15, 16). Then our author quotes a passage from a Lower Rhine document in the collection of Lacomblet, — a passage in which the word *communio* occurs; but he does not quote No. 21, of the same collection, in which the phrase *propria hereditate in communionem proximorum suorum* is to be found; which shows that the word *communio* in itself is not sufficient evidence of "wirkliche Gemeinschaft des von den Genossen bewohnten Grund und Boden."

Now we will see how Von Maurer establishes the corporate character of the "Markgenossenschaft." He says (Einleitung, p. 138): "Die volkberechtigen Inhaber einer Feldmark bildeten, innerhalb dieser Mark, eine wahre Genossenschaft, eine *universitas*."

In the foot-note is a reference to the Burgundian law, "Tit. 49, C. 3, *Universitatem convenit observare*." Referring to the law, however, I find that our author has omitted, after *observare*, the words *ut caballos alienos per regionem vagantes nemo corripiat*. This is evidence to show that the mark-community was "eine wahre Genossenschaft, eine *universitas*"!

Lastly, we will see how our author establishes the fact of proprietary equality among the *Markgenossen*. He says (Einleitung, p. 71): "Die ursprünglich gleiche vertheilung geht schon aus Tacitus [in a note he quotes the *agri pro numero cultorum etc.*, but not the words *secundum dignationem*, which destroy the force of his argument, if it has any], und auch noch aus spateren Urkunden hervor." In the foot-note we are referred to a document of Freising (Meichelbeck, I. 2, p. 474). The words *pratorumque aequalem mensuram sibi habendum* are quoted. Turning to my Meichelbeck, however, I find that the document referred to is an exchange or *commutatio* of land between the Bishop of Freising and two brothers. The latter alienate *quicquid proprietatis habuerunt* in a certain place, and receive in exchange an equivalent; *cultae, et incultae, pratorumque aequalem mensuram, sibi habendum, dandum, vendendum, posteris suis relinquendum, seu quod libet faciendum exinde*. This is evidence to prove the existence of proprietary equality among the Markgenossen!

If the reader will take the trouble to look through the foot-notes of our leading writers upon Teutonic institutions, he will find repeated references to, or quotations of these striking passages in the argument of Von Maurer; and he will observe that in many cases they are the premises of wide-reaching arguments. The institutions of the East and of the West have been interpreted in the light of them. Sir Henry Maine says in his book entitled "The Early History of Institutions" (p. 3), that "the results obtained by the special method of Von Maurer have been verified by comparison with phenomena discovered in the most unexpected quarters." In that case somebody has "verified very unjust things," as Dogberry says.

Six years after the publication of the "Einleitung" of Von Maurer, the theory of village communities or "primitive communism" among the Germans was presented again, and urged by Friedrich Thudichum, in his "Gau- und Markverfassung"

(Giessen, 1860). Thudichum, like Von Maurer, assumes the existence of communism in land in pre-historic and early times, and, like Von Maurer before him and Prof. Nasse after him, he maintains that this ancient communism has persisted in many parts of Western Europe through the Middle Ages to our own day. He says (p. 183) that the evolution out of this communism into separate ownership in land was very slow. "For centuries the individual got his land from the community of which he was a member." But where is the evidence to support this theory? Cæsar tells us that the people received their land by allotment from their chieftains, and, for all that we can learn from this our earliest authority, the chieftains may have owned the land which they distributed to their followers. Tacitus tells us that the division of land among the people was *secundum dignationem*. The land was allotted by the chieftains to their followers, and it was afterwards divided by them in the manner described. There is no evidence in Cæsar, nor in Tacitus, to show that the individual got his land by allotment from the community of which he was a member.

Leaving Cæsar and Tacitus, we come to the laws, formulæ, and documents of the fifth and following centuries. From all these it appears that land was acquired by inheritance, conquest, occupation, purchase, or gift, and in no case, so far as I am able to discover, from any such association as that which is described by our authors as a "Markgenossenschaft mit Feldgemeinschaft." Whatever "Markgenossenschaften" we meet with (I am not speaking of manorial groups) are "Markgenossenschaften ohne Feldgemeinschaft"; associations of freemen bound together by kinship and neighborhood, — associations municipal rather than communal. But let us argue our case in a logical fashion. It is certainly true that, if the individual got his land from the community of which he was a member, he did not get it by inheritance. If he got it by inheritance, he did not get it from the community. A law of inheritance in land, equal division among sons, or nearest kinsmen if there were no sons, is common to all branches of the Teutonic race in the earliest period of their recorded history. From which it follows that the individual did not get his land from the community of which he was a member.

In no sense can he be said to have gotten it from the community; for it appears from passages of the Bavarian law (XI., XVI., XVII.), the Saxon law (XVI.), and other sources, that the individual used to vindicate his claim to inherited and otherwise acquired property in land by battle, when his claim was disputed, and no compromise could be effected. Here we have what appears to be an archaic custom of the Germans. It is passing away when we meet with it. Moreover there are unmistakable indications and traditions of the practice among other Aryan peoples. Compare for example the procedure in vindication of quiritarian ownership in the fourth book of Gaius; especially the words *festuca autem utebatur quasi hastae loco signo quodam justi dominii*. When the right of ownership in land was contested, a clod of earth was brought into court, and the litigants touched it with their wands. The litigants in the Lex Alamannorum (LXXXIV.) touch the *curffodi* with their spears, *cum spadis suis, cum quibus pugnare debent*. Of course the Germans were not taught the real *pugna duorum* by the Romans at any time after the beginning of their intercourse; so we cannot but accept it as a practice which they brought with them out of their own past. It follows that the individual did not hold his land from the community, in any sense; not even, as it appears, under its protection. So much, at least, may be said against the theory that "der einzelne sein Ackerland nur von der Gemeinde besitze."

But we have been reasoning against Thudichum without touching his argument. We have been showing that he cannot be right, without showing that he is wrong. The fundamental error in his argument lies in its disregard of the chronology of the evidence. We are told that in the course of many centuries a right of inheritance in land sprang up. The arable fields, having come to be regarded as private property, were consequently regarded as hereditary property, and became subject to division and subdivision according to the law of inheritance. But it should be observed that the law of inheritance to which he refers, the law of allodial inheritance, dates back to a much earlier period than any of the evidence which he gives to establish the prevalence of communism and equality. The evidence by which he shows the existence of communism and equality dates between the years 800 and 1600 (see, for example, M. G. V., p. 165 *et seq.*); while the

evidence to establish the existence of private property, with rights of inheritance, dates between the years 500 and 800 (see p. 184 *et seq.*). In other words, the evidence considered chronologically reverses the order of the argument. Instead of proving that private estate was an issue out of communism, he proves, rather conclusively from his point of view, that the reverse of this was true; that in early times private property existed everywhere, but after a while gave place to communism.

The whole difficulty — what has led Von Maurer and his followers astray — is the failure to see that the association of allodial proprietors (the "Markgenossenschaft ohne Feldgemeinschaft") is one thing, and the land-community of the Middle Ages (the manorial community) is another. As I said in my first Study, certain passages of Cæsar and Tacitus were read. The institution of joint-tenure in the manorial communities was studied. It was then assumed that Cæsar and Tacitus describe joint ownership (sovereign ownership) of land, and the problem arose, how this joint ownership was changed to that joint tenure. The fact of the change having taken place was taken for granted, although the problem involved was not solved. The community of joint-tenants and the ancient association of allodial proprietors came to be regarded as one and the same institution, and Von Maurer, Thudichum, and others, set out to write its history. The laws, formulæ, and documents of the fifth and following centuries must have given them a great deal of trouble until they decided to disregard the chronology of the evidence, and to describe the community of the manor first, and the group of allodial proprietors afterwards. In this way they brought matters to rights, according to their preconceived notion of historical truth. If the reader doubts whether this is the true history of the Theory of Village Communities among the Germans, he should read the writings of Von Maurer and Thudichum, noting particularly the chronology of the evidence.

Before leaving the "Markverfassung" of Thudichum, I must give the reader a specimen or two of the reasoning in it. This is the more necessary, as I am told that the method of Thudichum is admirable and strictly scientific. He tells us (p. 182), speaking of his mark-community, that the individual could not have as much of the arable land as he wanted. Thirty *Morgen*

and no more was given to each man. He tells us that this allotment was called the *terra sortis titulo acquisita*. He quotes the Burgundian law (Tit. I. 1); and, after that, proceeds to quote, 2 *sortes*, *sortes* 3, *sortes* 53, from documents. Then he adds, that the allotments to serfs and slaves were also called *sortes*, and corresponded with those of freemen. Now, in the first place, the *terra sortis titulo acquisita* of the Burgundian law is hereditary property, and is described as such in the passage quoted by Thudichum (Tit. I. 1). In the second place, if we find in the documents alienations of 2, 3, and more, even 53 *sortes*, and each *sors* was equivalent to thirty *Morgen*, it is evident that thirty *Morgen*, or one *sors*, was not the limit of individual property. That it was not is established beyond controversy by multitudes of early documents, besides those quoted by Thudichum himself. Lastly, if a man's serfs and slaves had each an allotment of thirty *Morgen*, what did he have himself? For another example of scientific method I will refer the reader to page 233 of the "Markverfassung," where the author quotes the Lex Salica, *si quis in silva alterius ligna furaverit etc.*, and says, "*alterius* gehört zu *ligna*, nicht zu *silva*." The argument is not original with Thudichum, but he is pleased to reiterate it, in order to show that forest-land was common property at the time of Lex Salica. Had he consulted other readings of the passage quoted, in which *aliena* occurs instead of *alterius*, it would have been well. It would also have been well if our author had looked into the Frankish formulæ and documents for a confirmation of his opinion that forest-land was common property. He would have found no such confirmation of his theory, for the formulæ and documents are full of references to forest-land acquired by inheritance, conquest, occupation, purchase, and gift.

We will now pass from the writings of Von Maurer and Thudichum to those of M. de Laveleye and Sir Henry Maine. Sir Henry Maine says in his last book, "The Early History of Institutions" (London, 1875): "The results obtained by the special method of G. L. von Maurer have meantime been verified by comparison with phenomena discovered in the most unexpected quarters. The researches of M. de Laveleye, in particular, have been conducted over a field of very wide extent, and although I dissent from some of the economic conclusions to which he has

been led, I cannot speak too highly of the value of the materials collected by him in the recently published volume which he has entitled 'La Propriété et ses Formes Primitives.'" I do not agree with Sir Henry Maine in his estimate of the materials collected in this book by M. de Laveleye. In the materials I see little that is new, while in the reasoning of the book I find much to criticise.

We have no new material surely in the chapter entitled "La Marke Germanique"; only the well-known passages from Cæsar and Tacitus, and a lot of citations at second-hand from Von Maurer. Of the passages in Cæsar and Tacitus, M. de Laveleye says: "Pour comprendre ses passages, souvent mal traduits, il faut se rendre compte d'une practique agricole encore en usage, de nos jours, dans certains villages qui possedent de vastes communaux, comme dans les Ardennes en Belgique." (Propriété, p. 74.) We may ask what right our author has to explain the account of a primitive institution given by an ancient writer by phenomena exhibited in our own day, without first making sure that those phenomena were exhibited by that institution. M. de Laveleye assumes that they were, in order to prove that they were. Whether he is right or wrong, his method of reasoning is objectionable.

The assumption which lies at the bottom of M. de Laveleye's reasoning may be stated in his own words (Propriété, p. 85): "Ce qui ne laisse aucun donte, semble-t-il? c'est que le partage périodique par la voie du sort est resté en usage, depuis les temps les plus reculés jusqu'à nos jours." This is something to be proved, not to be assumed. To be sure, M. de Laveleye makes some little show of reasoning about it, but it amounts to little more than a play upon the word *sors*, meaning lot or allotment. It is all very well to adduce quotations from the Burgundian and Gothic laws in which the word *sors* occurs, and it follows that there was a distribution of land at a time and a place; but it does not follow that there were any re-distributions of it afterwards. Had M. de Laveleye taken his quotations from the laws themselves, instead of from Von Maurer, he would have discovered that the *terra sortis titulo acquisita* was not only distributed, but was afterwards held, by the *consortes*, as hereditary and private property. M. Fustel de Coulanges is quite sound upon this point.

He says in his "Institutions Politiques" (I., p. 402): "On a trouvé dans la langue de cette époque le mot *sors* employé pour désigner une terre, et on a conclut de l'existence seule de ce terme qu'il y avait eu un tirage au sort des terres du pays; mais ce mot *sors* avait dans la langue latine, depuis plusieurs siècles, le sens propriété, de patrimoine: il s'appliquait à toute terre possédée héréditairement." The position of M. de Coulanges, as laid down in the "Revue des Deux Mondes" (in 1872–73), is considered by M. de Laveleye in a note (p. 84); but it is summarily dismissed.

The words of Festus, *sors patrimonium significat*, should be remembered in this connection. The fact that there was a distribution by lot does not show that the distribution was not *per stirpes*. See, in the Old Testament, Numbers, chap. xxxvi.; Joshua, chap. xix.; Chronicles, chap. vi. Suppose A, the progenitor of a clan, has five sons, B, C, D, E, F; and B has three sons, G, H, I; and G has four sons, J, K, L, M; and J has two sons, N, O; O's share in the clan-land (*Alodium de genealogia*. See Study I., p. 22) would be, according to the law of allodial inheritance, $\frac{1}{2}$ of $\frac{1}{4}$ of $\frac{1}{3}$ of $\frac{1}{5}$, or $\frac{1}{120}$ of the whole. But the method of division and distribution would be as follows: The clan-land would be divided into five equal parts, which would be assigned to the descendants of B, C, D, E, F, respectively, by lot. Then the descendants of B would divide their share of the clan-land ($\frac{1}{5}$) into three equal parts, which would be assigned to the descendants of G, H, I, respectively, by lot. Then the descendants of G would divide their share of the clan-land ($\frac{1}{15}$) in four equal parts, which would be assigned to the descendants of J, K, L, M, respectively, by lot; and, lastly, the sons of J, N and O, would divide their inheritance in the clan-land ($\frac{1}{60}$) into two equal parts and draw lots for them: and the land of O, $\frac{1}{120}$ of the clan-land, would be his inheritance, by lot, — his *terra sortis titulo acquisita*, or, according to Victor Vitensis, his *terra funiculo hereditatis acquisita* (compare Hist. Persec. Vandal, I., cap. 4). The process of division and distribution would be, in the words of the old formula, a *divisio vel exaequatio inter consortes de alode vel de agro* (Rosière, CXXVII.). Compare Study I., Nos. 36, 37, 38, 39, 40, 63, 64, 65.

It is worth while in this connection to remember the significa-

tion and use of the Greek word κλῆρος; "an allotment of land, but in early authors generally any piece of land, farm, estate" (Liddell and Scott); and see, for example of the use of the word to describe an inheritance, Hesiod, "Works and Days," line 37.

M. de Laveleye insists, in his account of the Teutonic community (p. 77), that "chaque famille avait droit à la jouissance temporaire d'une part dans chacune des divisions de la *mark*, mais nul n'y exerçait un droit permanent et héréditaire." This statement is contradicted by all that early legal and documentary evidence which was given in the first of this series of studies. It is also contradicted by a most respectable weight of authority. As long ago as 1844, M. Guérard, the learned editor of the "Polypticus Irminonis" said (I. 2, p. 476; see the same in the Bibl. de l'École des Chartes, I. 3, p. 113): "L'alleu, *alodis*, *allodium*, comme le propre, ne fut d'abord, a ce qu'il paraît, autre chose que le patrimoine"; and again, further on, "On donna le mot d'alleu à tout ce qui fut possédé en propre, par héritage, par achat, ou par donation." M. de Coulanges says in his "Institutions Politiques" (Paris, 1875, I., p. 460): "Observons les codes qui furent écrits par les Francs; ils nous présentent l'image, non d'un peuple de guerriers mais d'un peuple de propriétaires. Ils ne sont pas faits pour une troupe vivant en commun, mais pour une société où l'individu vit et possède isolément. Riche ou pauvre, chacun à sa maison, son champ qui est bien à lui, sa haie qui enclôt son champ, la limite inviolable qui enserre sa propriété. Si la terre était en commun, les lois ne régleraient que des partages de jouissance; ce qu'elles constituent au contraire, c'est toujours la propriété individuelle; ce qu'elles protégent et garantissent, c'est le patrimoine."

Dr. von Inama-Sternegg, who has been writing admirable books, books too little known to English readers, upon the early history of ownership, tenure, and cultivation of land among the Germans, says, in his "Wirthschaftsgeschichte" (Leipzig, 1879, I., p. 100): "Steht damit aber auch die Thatsache fest, dass ein Sondereigenthum an Grund und Boden allenthalben bei den Deutschen Folkstämmen in der Zeit ihrer Folksrechte bestand." Even Von Maurer grants that, in the earliest time, there were "Markgenossenschaften ohne Feldgemeinschaft" (Einleitung, p. 10 *et seq.*). What Von Maurer considered the exception, Von

Inama-Sternegg has shown to be the rule. In his "Hof-system" (Innsbruck, 1872, p. 47), he said: "Wärend nämlich vor derselben [der Völkerwanderung], also besonders zur Zeit des Tacitus, noch nicht mit Bestimmtheit allgemein Sondereigen am Ackerlande angenommen werden kann, tritt dasselbe nach der Völkerwanderung unzweifelhaft als vorherrschend auf." The same writer, in a notice and review of the first of this series of Studies, in the "Jahrbücher für Nationalökonomie und Statistik" (July, 1880), says, that it is a fact beyond controversy, "dass vom Anfang der urkundlich beglaubigten Geschichte an, die Deutschen Sondereigenthum an Grund und Boden und ein festes Recht der Erbfolge in Grundbesitz hatten, welches sich mit dem Prinzip des Gesammteigenthums an allem Land, das periodische Neuvertheilung unbedingt nothwendig gehabt hätte, absolut nicht verträgt." From all this it is evident that M. de Laveleye has the burden of proof on his side.

Before taking up other parts of M. de Laveleye's argument in "La Propriété," let us see what Sir Henry Maine, our leading English authority, has to say about the Teutonic land-community. We shall see that it is only what Von Maurer and Prof. Nasse have urged before him. He says (Village Communities, p. 12): "I should probably have left this subject in the hands of writers who have made it their own, if it were not for one circumstance. These writers [Von Maurer and Prof. Nasse] are obviously unaware of the way in which Eastern phenomena confirm their account of the primitive Teutonic cultivating group, and may be used to extend it." It is professedly upon the authority of Von Maurer and Prof. Nasse, that Sir Henry Maine says of this group that it was "an organized, self-acting group of Teutonic families, exercising a common proprietorship over a definite tract of land, its Mark, cultivating its domain on a common system, and sustaining itself by the produce. It is described by Tacitus in the 'Germany' as the 'vicus'; it is well known to have been the proprietary, and even the political, unit of earliest English society" (V. C., p. 10).

I hope that the reader is convinced that we have no sufficient reason to believe that the *vicus* of Tacitus was a self-acting group of families exercising a common proprietorship over their land (proprietorship *per capita*, according to Von Maurer); and

we may go on to consider "the well-known fact" that such a group was "the proprietary, and even the political, unit of earliest English society." May we not deny this upon the best authority? As long ago as 1858, Dr. Schmid, an eminent authority, denied the existence of "wirkliche Markgenossenschaften" in England ("Gesetze der Angelsachsen," Glossary, under *meare*), and more recently Canon Stubbs has said (Constitutional History, I., p. 83): "It cannot be safely affirmed that the German settlers in Britain brought with them the entire system of the mark organization, or that that system was ever in Anglo-Saxon times the basis of local administration. . . . . We nowhere see [p. 84] the qualification of the freeman for political rights depending on a partnership in tenure and cultivation of common land." From which it appears that Sir Henry Maine's "well-known fact" is very questionable. It will be urged, however, that Canon Stubbs admits that vestiges of the ancient mark-community are to be found among the Anglo-Saxons; which is the case (see Constitutional History, I., p. 84). So it behooves us to show that the evidence which he adduces, to establish these vestiges of the ancient mark-community in England, is not conclusive.

The evidence goes to show that kinship was a bond of union among the inhabitants of the Anglo-Saxon townships. Canon Stubbs is inclined to argue, that this fact is evidence of the existence of mark-communities. It is not, however; for, though the Anglo-Saxon towns were inhabited by the descendants of common progenitors, the land may have been owned in ancestral shares, *per stirpes*, as well as in common, *per capita;* and, if it was owned *per stirpes*, the community was a community without communism, a "Markgenossenschaft ohne Feldgemeinschaft," which is not the mark-community Canon Stubbs has in mind. (Compare Const. Hist., p. 49; noting by the way the references to Von Maurer). Then Canon Stubbs quotes the law of Ine, King of Wessex (§ 42): "If ceorls have a common meadow or other partible land to fence, and some have fenced their part, and so on." He cites this as evidence to establish the existence of the ancient mark-community among the Anglo-Saxons. This may be questioned. The land is partible, but we cannot say whether upon communistic principles or not. Perhaps it was owned in unequal shares. These shares may have been obtained

by inheritance, or even by purchase or gift. There is nothing in the law to the contrary. We cannot say whether particular parts of the open field belonged to particular persons, or only undivided shares of the whole. We cannot say whether the ceorls owned the land which they were about to fence in, or not. They may have been tenants simply. Perhaps they paid services and rent for their land. For all that we can learn to the contrary, these ceorls with a common field to fence, were serfs, *villani*. The common field may have been part of a manor, and the ceorls members of a manorial village, not members of a mark-community. Lastly, Canon Stubbs finds traces of the mark-community in the Court Baron of the manor, but the argument involves the assumption that the mediæval manor and the mark-community of early times are one and the same institution, — involves the problem, "How did the mark become the manor?" which problem we will now proceed to consider.

Mr. Mill in a notice and review of Sir Henry Maine's "Village Communities" (Fortnightly Review, May, 1871) says: "Our law books trace all landed tenures in England to a feudal grant. From such grant, either actual or presumed, they all technically proceed; and the law writers seldom trouble themselves with anything anterior. But there were landed possessions in England before there was feudality. The feudal lords were the successors of former holders; and in order to know what the lord could either claim for himself or grant to others, it is necessary to know whose rights he succeeded to. In this there is now no obscurity," continues Mr. Mill. "The feudal lord took the place of the collective village community; the Mark system passed by transformation into the Manorial. The rights which had belonged to the village as a collective body became the rights of the lord; the customary rights which the several households of the village could claim from the collective body were not lost, but remained valid against the lord." It appears, however, that by excluding the mark-system from English ground we have removed that system from all contact with the manorial system of feudal times; and it cannot be altogether plain how the feudal lords "took the place of the collective village community," or how the mark-system "passed by transformation into the manorial." Feudal lordship must have supplanted something else, whatever it was, that

came before it. Referring again to Canon Stubbs we discover that this was "absolute ownership of land," which was "the rule in Anglo-Saxon times" (Const. Hist., I., p. 75). That being the case, what becomes of that "great problem of legal history," "How did the mark become the manor?"

What Canon Stubbs says of Anglo-Saxon England may be said of all German portions of the Continent, for the earliest period of their recorded history. The evidence has been collected in the first and second of this series of Studies, and testimony of great authority has just been presented. There is no doubt that absolute ownership of land was the rule among all branches of the Teutonic race at the time when we first meet them in history. Upon the supposition that the manor under feudal lordship is an institution of later date, it follows that our "great legal problem," "How did the mark become the manor?" has no more bearing upon the Continent than it has in England; the true problem being how allodial landlordship was changed into feudal landlordship.

In connection with this last and true problem arises another: Is the manor an institution which arose with mediæval feudalism, or were there manors under allodial landlordship? This subject was considered in Study II. In that Study we discovered associations of tenants under allodial landlordship, corresponding in all particulars with the associations of tenants under feudal lordship; so it appeared evident that they were identical; that they were one and the same institution. The conclusion reached in Study II. may be here repeated. When the Teutonic clansmen took possession of a tract of land they marked off a certain portion (described a *mark*) and divided it *per stirpes;* the share of each clansman being determined by the law of allodial inheritance applied to the genealogy of his descent from the common progenitor. When the mark was thus divided, each clansman distributed his share, or a portion of it, among his vassals and slaves, except such as were supported as personal companions. Each received ground for a house and garden, and an allotment of arable, meadow, pasture, and forest land, or rights therein; and in the group of houses and gardens held by the vassals and slaves of the allodial landlord, and in the aggregate of their several allotments, we have the land-community of the early and middle ages.

That this conclusion was true with regard to the Anglo-Saxons coming into England I had no doubt when I wrote this; but I am particularly glad to have my view confirmed by the conclusion independently reached by my friend Mr. F. Seebohm, in a paper read before the London Society of Antiquaries last April. He showed, conclusively I think, that the open-field system of the English manorial communities has always been associated with tenure in serfdom. Consequently he does not think that the yard-lands of the mediæval serfs have any connection with the divisions of allodial property which were made when the Germans first came over into England. It is to be hoped that Mr. Seebohm will soon place his argument in reach of the public.

It must be evident to every one who thinks of it, that the earliest form of possession of land must be a form of sovereign ownership, as distinct from any form of tenure. So it follows, that it is a sufficient answer to those who maintain the theory of village communities (or "primitive communism") among the Germans, that the cases which they adduce in evidence are regularly cases of collective tenure. See, for example, the document of 1173 cited by Von Maurer, and from him by M. de Laveleye in "La Propriété" (p. 78). The land-communities of Western Europe have been from very early times associations of tenants and serfs, and it remains to be shown that they were ever anything else; that they were ever associations of sovereign owners and freemen. If my opponents persist in maintaining their theory, they must show, first, that the earliest form of possession of land among the Germans was sovereign ownership, *per capita*, as distinct from any form of collective tenure. Then they will have to show how their ancient ownership *per capita* was changed into the particular forms of collective tenure which we have in the manorial communities of the Middle Ages. How difficult it will be for them to establish the first point must be evident, in view of the evidence presented in the first of this series of Studies. Until that point has been established they need not explain how sovereign ownership *per capita* might be changed into the forms of collective tenure with which we are acquainted in our mediæval records. That will not help on their cause in the least, for they have to show how it was so changed. Until they have

established their ownership *per capita*, they need not trouble themselves about what became of it.

Now we will leave the Teutonic ground of our argument, and "the results obtained by the special method of G. L. von Maurer," to examine the "phenomena" by which these results, according to Sir Henry Maine, "have been verified."

Sir Henry Maine tells us in his "Village Communities" (p. 12), that he would not, probably, have taken up the subject had it not been for one circumstance, viz. that Von Maurer and Prof. Nasse and their followers were unaware "of the way in which Eastern phenomena confirm their account of the primitive Teutonic cultivating group, and may be used to extend it." Then he goes on to say, that the village communities of India exhibit "resemblances to the Teutonic township which are much too strong and numerous to be accidental." Granting that the resemblances are numerous and striking, we must determine precisely what the Teutonic cultivating group was. Was it a group of tenants and serfs cultivating the land of allodial, and afterwards feudal, proprietors? This is what we must believe until it has been shown that it was an independent self-acting group of kinsmen; and in the mean time Sir Henry Maine must tell us whether the Indian village communities have not been, until within very recent times, also groups of tenants and serfs; otherwise we must deny that the resemblances between the Teutonic and Indian village communities are more than superficial.

Sir Henry Maine says (V. C., p. 179), "that all Oriental sovereigns feed their courts and armies by an unusually large share of the produce of the soil which their subjects till"; and he adds, that "the Indian monarchs of whose practices we have any real knowledge took so much of the produce in the shape of land revenue as to leave to the cultivating groups little more than the means of bare subsistence." Which statement, alone, shows that the Indian village communities have been, in past time, associations of tenants, if not of serfs; for he who holds the rent of land is its owner, and he who pays the rent of land is the tenant. So, although I could adduce conclusive evidence to show that the Indian village communities have been associations of tenants, I will take that for granted. Taking that for granted, it follows that, in order to maintain his theory, Sir Henry Maine must show

that the Indian village community, as an association of tenants, was, in its origin, an association of land-owners and freemen. He must show that the inhabitants of the Hindoo villages originally owned the land, which they have since held in tenure, upon the condition of an annual payment of the rent. He must, moreover, show that this original ownership was ownership *per capita;* otherwise, he breaks free from the "results obtained by the special method of Von Maurer." If Sir Henry Maine maintains that the earliest form of the possession of land was sovereign ownership *per capita* (see "Early History of Institutions," p. 195), it will not serve his purpose to exhibit groups of tenants as cases in evidence, especially if the tenure of these tenants is, or has been, a tenure *per stirpes*.

It appears from the evidence that the tenure of land in the Indian villages is not *per capita*, but *per stirpes*, in so far at least as the villagers are of Aryan extraction (compare Village Communities, p. 112). Sir Henry Maine tells us (Ancient Law, Chap. VIII.) that the simplest and most common form of the Indian village is a body of kindred holding a domain in common, — "an assemblage of joint proprietors." He goes on to explain how this assemblage arises. "Separate proprietorship," he says, "is always on its way to become proprietorship in common"; for, as he explains it, although there is a law of inheritance to govern the distribution and enjoyment of land, "division rarely takes place, even at the death of the father, and the property constantly remains undivided for several generations, though," as he admits, "every member of every generation has a legal right to an undivided share of it." This share would of course be determined by the law of inheritance applied to the genealogy of descent from the common progenitor of the joint proprietors. This, if I understand it, is Sir Henry Maine's account of the existing village community in India. It agrees in all respects with the account which is given us by the other leading writers; Elphinstone in his History of India, and Sir George Cambell in the Cobden Club Essays, for example. The existing village community in India is a community without communism. As Sir George Cambell says, "there can be no greater mistake than to attribute to the Indian village system any of the features of communism." The tenure of land is a tenure *per stirpes*, and not a tenure *per*

capita. It follows, therefore, that, in order to maintain his theory of primitive communism, Sir Henry Maine must show that in early times the tenure of land in the Indian villages was *per capita*, and that this tenure was originally sovereign ownership (his primitive village community is an independent self-acting group of kinsmen); or else he must show that the existing tenure *per stirpes* was in early times sovereign ownership *per stirpes*, and that this ownership was originally ownership *per capita*. These are the conditions of satisfactory demonstration in his case. Have they been in any degree fulfilled?

Sir Henry Maine says (Village Communities, p. 112): "I have not obtained any information of any systematic removal and still less of any periodical re-partition of the cultivated lands, when the cultivators are of Aryan origin. But," he continues, "experienced Indian officials have told me that, though the practice of re-distribution may be extinct, tradition of such a practice often remains"; and it is upon this information that he ventures to say (V. C., p. 82), that there are "widely extended traditions of the practice of re-distribution among the Hindoo villagers." But what of that? The statement is perfectly credible, but nothing follows from it; for re-distribution may be *per capita* or *per stirpes*. If the re-distributions in the present case were re-distributions *per capita*, among the heads of families, or among the able-bodied males, the fact would go to support the position of Sir Henry Maine. If, however, the re-distributions were *per stirpes*, and there is nothing in Sir Henry Maine's statements to show that they were not, the fact would support our case. Sir Henry Maine must tell us whether the ancient re-distributions of the land in the Indian villages were re-distributions *per capita* or *per stirpes*. We know that the latter have been long customary. See Elphinstone's History of India, "Notes on the Revenue System," where there is a description of a re-partition of land *per stirpes;* and Sir George Cambell tells us that the land in the Indian villages is never equally distributed, but only "re-parted according to the recognized ancestral shares" (Cobden Club Essay). It remains to be shown that any other mode of re-distribution was ever in practice.

But let us suppose, for the sake of argument, that some cases of re-distribution *per capita* have been adduced; cases, moreover,

in which such re-distribution is made by people of Aryan extraction, no other cases being admissible in the present argument. We have still a reply. Sir Henry Maine tells us that "the Indian monarchs of whose practices we have any real knowledge took so much of the produce in the shape of land-revenue as to leave to the cultivating groups little more than the means of bare subsistence." And it follows from this, that, if the tenure of land was *per stirpes*, the burden of rent would fall upon the tenants *per stirpes;* and in many cases it would fall heavily and unjustly. Picture to yourselves a widow, with two small boys, having to pay rent for two ploughs, while three able-bodied brothers would pay for no more than one plough and a half. In the Punjab the shares of the villagers are estimated in plough-lands. Then consider how easily and naturally the tenure *per stirpes* might be changed to tenure *per capita*. Elphinstone tells us, that "in some villages the rights of the landholders are held in common, the whole working for the community and sharing the net produce," *per stirpes*, after satisfying the claims of the government; the head-man having settled with the government the sum to be paid to it for the year (History of India, I., pp. 122, 125, 129, and Appendix V, G.). It is easy to suppose, all things being considered, that the villagers would, in course of time, find it more advantageous and more simple to divide the net produce, after satisfying the claims of the government, *per capita*, instead of *per stirpes*. If they did so we should at once have a tenure *per capita*, instead of a tenure *per stirpes*. So, if my opponents adduce (they have not done so as yet) any cases of periodic or occasional re-distribution of land *per capita* in India, in Aryan villages, I shall maintain that it has been the result of economic causes concomitant with serfdom; and I can refer to the history of the Russian *mir* in illustration and support of my position.

The Russian *mir* is the model village community of my opponents. It is a real village community, the land being subject to periodic re-distribution *per capita* among the able-bodied males. "The family is not impoverished by the birth of a child, but, on the contrary, enriched. For with the number of children increases the share of the family in the village household. Of all that is held in common they partake a head's share more." (Dr. Faucher, in Cobden Club Essays.) It is in Russia that the advocates of

the theory of village communities find the type of their village. As Sir Henry Maine says (Village Communities, p. 82), "the ancient periodic re-distributions" have there "continued to our own day." But what evidence is there that the periodic re-distributions in the Russian villages are ancient?

Sir Henry Maine tells us (Ancient Law, Chap. VIII.): "The researches of M. de Haxthausen, M. Tengoborski, and others, have shown us that the Russian villages are not fortuitous assemblages of men, nor are they unions founded on contract; they are naturally organized communities, like those of India. It is true," he admits, "these villages are always in theory the patrimony of some noble proprietor, and the peasants have within historical times been converted into the predial, and to a great extent into the personal, serfs of the seignior. But the pressure of this superior ownership has never crushed the ancient organization of the village." This is Sir Henry Maine's argument, and it leaves us to suppose that the periodic re-distributions which take place in the Russian villages to-day were a feature in their ancient and primitive organization. We are led to suppose that the practice of re-distribution prevailed before the institution of serfdom.

M. de Laveleye sums up the views of two well-known writers upon the history of the *mir*, "MM. Tchitcherine et Bistram" (Propriété, p. 15). "D'après eux," he says, "jusqu'à la fin du XVI^e^ siècle, les paysans étaient libres et propriétaires indépendants de la terre qu'ils cultivaient. . . . . La communauté des terres et le partage périodique étaient inconnus. . . . . La communauté agraire, dit en terminant M. Tchitcherine, a été le produit de la servitude; elle disparaîtra avec elle devant la liberté." "Mais," argues M. de Laveleye in reply to this (p. 16), "comment supposer que les paysans aient introduit spontanément [in consequence of servitude, says M. Tchitcherine; "spontanément" is a bit of persuasive rhetoric] une coutume aussi étrange que le partage périodique des terres, si celle-ci n'avait pas eu de précédents dans les traditions nationales? L'histoire nous montre partout au contraire la propriété individuelle sortant de la collectivité primordiale." This is the sum and substance of M. de Laveleye's reply to the writers "MM. Tchitcherine et Bistram." It should be observed, moreover, how M. de Laveleye assumes the existence of "collectivité primordiale,"

in order to establish it. In the first chapter of his argument about the primitive forms of property, he is reasoning upon its conclusion.

Passing over the earlier writings upon the Russian *mir*, already summed up for us by M. de Laveleye, it will be sufficient for our purpose to quote what Mr. D. Makenzie Wallace has to say upon this subject. After "a prolonged study" of communal institutions in Russia, and "a careful examination of the documents relating to the *mir*," he has reached the conclusion "that the periodic re-distributions are a relatively modern institution." This conclusion, he tells us, is "supported by all the older documentary evidence which we possess." "We have no satisfactory proof," he tells us, "that this custom [of periodic re-distributions] existed in any part of Russia before the seventeenth century." This is testimony of the best authority, directly contradicting the statements of Sir Henry Maine and M. de Laveleye, and destroying their position. See Mr. Wallace's article upon Russian Village Communities, in Macmillan's Magazine for June, 1876.

It is surprising that Mr. Wallace's investigations, and his conclusions, which have been made public, have not spread dismay among the advocates of the theory of village communities; for the theory rests, in great measure, upon the ability of its advocates to maintain that the practice of periodic re-distribution of land in the Russian villages is immemorial and archaic, — a primitive custom which has survived to our day. But Sir Henry Maine says, in the Fortnightly Review for the year 1877, still with confidence: "We trace the manorial group backwards to an earlier social form, a body of men democratically or rather aristocratically governed, in which the free tenants had as yet no lord, the village community." In a foot-note he continues: "Although no question has been more discussed by German and English scholars, the exact mode in which the manor arose out of pre-existing social forms is still a very obscure problem. In a work published five years since (Village Communities in the East and West, pp. 131 *et seq.*), I gave an abridged account of all that was then known or had been conjectured upon the subject, but great additions to our knowledge may be expected from Russia, where the growth of lordships and of the chief incidents of villenage are of recent date, and where there appears to be materials for an au-

thentic history of this social transformation" (which transformation is taken for granted; compare the Introduction to Study I., quoted above, p. 12). Then Sir Henry Maine refers to Mr. Wallace's writings, but he does not apparently see that, according to Mr. Wallace, the Russian manor and the Russian village community are one and the same institution, — that the periodical re-distributions, the stamp of the village community, are one of the chief incidents of villenage in the manor, one of the chief incidents of the villenage which is of so recent date.

According to Mr. Wallace, the Russian *mir*, with its communism in land and periodic re-distributions, *per capita*, has never been a body of men democratically governed, in which the free tenants had as yet no lord; for that communism and those re-distributions are incidents of serfdom, concomitant with it, and now surviving it. Taking Mr. Wallace's conclusions for granted, the question may very well arise whether the Russian *mir*, as we see it to-day, is not the last form of the manor, instead of being the first form of the village community, as Sir Henry Maine maintains. (See his Early Institutions, p. 195.) This will be a subject for future investigation.

Now let us take up Sir Henry Maine's "Early Institutions," and let us see whether the facts that he gives us in that book do not go to show that the earliest form of possession of land was ownership *per stirpes;* whether they do not support our theory against his, — that the earliest form of possession of land was ownership *per capita*. "Whence does co-tenancy [collective ownership?] arise?" says the Brehon Tract. The answer is, "From several heirs, and from their increasing upon the land." (Early Institutions, p. 112.) Then we meet with Sir John Davis's "Case of Gavelkind" (Id., p. 186), which is a case of co-tenancy; and it is thus described by Davis: "By the Irish custom of Gavelkind the inferior tenanties were partible among all the males of the Sept, both bastards and legitimate; and, after partition made, if any of the Sept had died, his portion was not divided among his sonnes, but the chief of the Sept made a new partition of all the lands belonging to that Sept, and gave every one his part according to his antiquity." "According to his antiquity," that is to say, according to his position in the genealogy of descent from the common progenitor, and according to the law of inheritance. Compare the phrase of Tacitus, *secundum dignationem*.

Sir Henry Maine seems to think that this Irish Gavelkind differs widely from the Gavelkind of Kent, according to which property in land descended to the male heirs of the body, each son receiving an equal share. But I cannot see that there is any wide difference between them. By Irish Gavelkind, if the deceased had two sons, they would receive in the general re-distribution according to individual "antiquity," or *per stirpes*, the equivalent of equal shares of their father's property. If the deceased had no sons, his brothers, or his uncles if he had no brothers, would receive in the same manner the equivalent of equal shares of his property; but they would not receive shares of the same land that he possessed and enjoyed. This is one point of difference between the two sorts of Gavelkind. There is another. By Irish Gavelkind, if the deceased had acquired by appropriation, or purchase, or gift, any land in addition to what he had by inheritance, his heirs were cut off from all right of inheritance therein; for, in the general re-distribution according to individual "antiquity," such additions to hereditary property, or rather their equivalent, would revert to former possessors. The practice of general re-distribution *per stirpes* amounts to a veto on alienations. It prevented all alienation in perpetuity, and consequent concentration of landed property in the hands of a few families, to the impoverishment of the rest. It appears, from the quotations which Sir Henry Maine makes from the Brehon Tracts (p. 107 *et seq.*), that the possession and enjoyment of land was intended to be strictly genealogical, that is *per stirpes*. By Kentish Gavelkind, however, whatever land belonged to the deceased, whether he had it by inheritance, purchase, or gift, went to the male heirs of his body, and was equally divided among them; though it may not have been so in early times.

Sir Henry Maine says (Early Institutions, p. 189): "Surveying the Aryan world as a whole, and looking to societies in which some fragments of the ancient social organization still survive, we can discover forms of succession or property which come surprisingly near to the Irish Gavelkind described by Davis. The best example of this occurs in a practice which existed down to our own day over a large part of Russia. The principle was that each household of the village was entitled to a share of the village lands proportioned to the number of adult males it contained [the right of tenure and enjoyment being, accordingly, *per*

capita]. Every death, therefore, of a grown-up man diminished *pro tanto* the share of the household, and every member of it grown to manhood increased its lot in the cultivated area." Then Sir Henry Maine says: "The principal distinction between this system and that which seemed so monstrous and unnatural to Sir John Davis is, that, under the first, the re-division took place, not as each death occurred, but at stated intervals." Had Sir Henry Maine taken a genealogical table, and made a general distribution of say a thousand acres of land among supposed living members in his Table, according to individual "antiquity," or *per stirpes* (he grants that the distribution according to "antiquity" is probably distribution *per stirpes*, Early Institutions, p. 188), he would have discovered that the number of adult males in any family makes no difference whatever in the amount of land which they come to possess and enjoy. Whereas, in the Russian village, as he tells us, they come into possession and enjoyment of more land as they are more numerous. Moreover, according to Irish Gavelkind, there was no equality of possessory rights (unless by accident), except among brothers; whereas, in the Russian village, everybody, whether near-related or not, holds precisely the same amount of land; that amount being determined, not, as in the Irish community, according to individual "antiquity," or *per stirpes*, but according to the number of able-bodied males, *per capita*. There is a fundamental distinction between collective ownership *per capita* and collective ownership *per stirpes;* a distinction which Sir Henry Maine does not apparently perceive, when he says that the principal distinction between the Russian and the Irish re-distributions was that the first took place at stated intervals, while the other took place as each death occurred. There is absolutely no ground of comparison between the Gavelkind of Sir John Davis and the tenure of land in the Russian *mir*, except that we have in them two forms of one thing, two forms of collective property. One rests upon the principle of communism, the other contradicts it.

The repeated re-distributions, *per stirpes*, of the land of the Irish septs shows that there was no thought of ownership of any particular land, only of undivided shares. The right of individual property in land is fully conceded, but it is a right, not to this piece of land nor to that, but to an undivided share of all that there was; and this share was determined by the law of inherit-

ance, — equal division among sons, applied to the line of descent from the progenitor of the sept. This, I am inclined to maintain, is the earliest form of ownership of land, at least among Aryan peoples. The patriarchal system is followed by a tribal or clan organization: the tribesmen or clansmen are bound together by kinship, either real or fictitious, and by the ownership of land according to that kinship, genealogically or *per stirpes*. The next step leads to society founded upon separate property, each family being confirmed for a perpetuity in the possession of particular tracts of land. Simultaneously with the appearance of separate property in land there is a spread of dependence, which leads to the origin and establishment of the manorial group. The individual land-owner is surrounded by a group of dependents, to whom he makes allotments of land, from whom he receives services or rent in exchange; and the group of dependents and tenants thus instituted becomes organized and developed into the manorial land-community. I ask the reader whether this general theory, if we cannot get on without one for a while, is not more simple and more nearly coincident with the early records, so far as we are acquainted with them, than that of Sir Henry Maine, who takes the Gavelkind of Ireland to be a form of collective property intermediate between the tenure *per capita* of the Russian villages and the tenure *per stirpes* of the Indian villages. Sir Henry Maine's theory would, it seems to me, conform much more nearly with the facts, if reversed; if, instead of maintaining that tenure *per capita* precedes tenure *per stirpes*, he maintained that tenure *per stirpes* comes first, and tenure *per capita* afterwards, as a last stage in the history of the village community; for, as we have just seen, his belief in the comparatively slight departure of the Russian village from the primitive type (Early Institutions, p. 83) is untenable.

In order to complete this review and criticism of the argument by which the theory of village communities has been established, I ought to take up M. de Laveleye's reasoning to prove that his natural and primitive communism, his "collectivité primordiale," is to be found among the Latins of Rome, the Greeks of Sparta, and among the people of the "Golden Age." Instead of doing this, however, which, I think, would be superfluous labor, I will quote what M. de Coulanges has recently written, by way of introduction to a series of articles upon Property in Sparta, in the *Journal des Savants* (February of this year, 1880).

" Il s'est produit, dans ces dernières années, une opinion historique qui nous paraît mériter une sérieuse attention, mais dont l'exactitude a besoin d'être vérifiée. On a soutenu que le droit de propriété sur le sol avait été inconnu aux antiques sociétés, qu'elles avaient longtemps cultivé la terre en commun, et qu'elles n'etaient passées au régime de l'appropriation que tardivement et par degrés. . . . . L'expression la plus claire de l'opinion nouvelle se trouve dans le livre qu'un esprit fort distingué, M. Em. de Laveleye, a publié en 1874, sous ce titre ; De la propriété et de ses formes primitives. L'auteur passe en revue presque tous les peuples du monde, la Russie, l'île de Java et l'Inde, la *marke* germanique et les communautés agraires des Arabes, Rome et l'Égypte, l'ancienne Grèce et la Suisse moderne. . . . . Je ne conteste pas que la méthode comparative ne soit fort utile en histoire ; elle peut devenir une source féconde de découvertes ; mais l'abus en est dangereux. Vous apercevez certaines communautés de village dans l'Inde ; vous rencontrez quelque chose d'analogue dans le *mir* russe et dans les petits villages de Croatie ; vous entrevoyez les mêmes traits dans les *allmenden* de la Suisse ; vous rapprochez de tout cela deux lignes de César sur les anciens Germains, une phrase de Diodore sur un petit peuple des îles Lipari, et quelques fantaisies des poètes latins sur l'âge d'or ; vous accumulez ainsi quelques indices, mais hâtivement recueillis, imparfaitement étudiés, pris çà et là en mêlant les époques et en confondant les peuples. Est-ce assez de cela pour déduire une loi générale de l'humanité ? Une telle méthode manque de rigueur. La comparison entre les peuples ne devrait venir qu'après une étude scrupuleuse et complète de chaque peuple. L'analyse doit précéder la synthèse. Je voudrais que l'histoire du *mir* russe, celle du village indou ou javanais, celle de la communauté agricole de Croatie, et même celle de la *marke* germanique, fussent plus nettement connues qu'elles ne le sont, avant qu'on tirât du rapprochement de ces connaissances une conclusion générale. Je souhaiterais qu'une génération de travailleurs s'appliquât séparément à chacun de ces objets et qu'on laissât à la génération suivante le soin de chercher la loi qui se dégagera, peut-être, de ces études particulières."

Surely nothing more than this need be said. No criticism could be more just, no advice better or more timely.

MSH 23949

Part IV

From the Author
Oct 1880

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STUDIES

IN THE

EARLY HISTORY OF INSTITUTIONS.

BY

DENMAN W. ROSS, PH. D.

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THE THEORY OF PRIMITIVE DEMOCRACY IN THE ALPS.

A PAPER READ BEFORE THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, AUGUST 27, 1880.

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THE THEORY OF PRIMITIVE DEMOCRACY IN THE ALPS.

As long ago as 1871, Sir Henry Maine said, in his book entitled "Village Communities in the East and West," that he knew nothing more striking among Mr. Freeman's many contributions to our historical knowledge than his identification of the fragments of Teutonic society, organized upon its primitive model, which are to be found in the Forest Cantons of Switzerland. Sir Henry Maine refers to the Swiss *Landesgemeinden*, or commonwealths, and to Mr. Freeman's theory about them; that they are an archaic political institution that has survived to our day.

You all remember, I am sure, the stirring description that Mr. Freeman gives of this institution in his Essay upon the English Constitution. "Year by year," he says, "on certain spots among the dales and mountain-sides of Switzerland, the traveller who is daring enough to wander out of beaten tracks, and to make his journey at unusual seasons, may look on a sight such as no other corner of the earth can any longer set before him. He may there gaze and feel, what none can feel but those who have seen with their own eyes, what none can feel in its fulness more than once in a life-time, the thrill of looking for the first time, face to face, on freedom in its purest and most ancient form. He is there in a land where the oldest institutions of our race, institutions which may be traced up to the earliest times of which history or legend gives us any glimmering, still live on in their primeval freshness. He is in a land where an immemorial freedom, a freedom only less eternal than the rocks that guard it, puts to shame the boasted antiquity of kingly dynasties, which,

by its side, seem but as innovations of yesterday. There, year by year, on some bright morning of the spring-tide, the Sovereign People, not intrusting its rights to a few of its own number, but discharging them itself in the majesty of its corporate person, meets in the open market-place, or in the green meadow at the mountain's foot, to frame the laws to which it yields obedience as its own work, to choose the rulers whom it can afford to greet with reverence as drawing their commission from itself." After saying so much in general with regard to "freedom in its purest and most ancient form," which he has discovered in the Alps, Mr. Freeman goes on to describe what he calls "the immemorial democracy of Uri"; and this description serves to illustrate what I have just read to you.

Without doubt we have in the Swiss commonwealths, in Uri and Appenzell, for example, the purest form of democracy, — democracy without representation. Every freeman has an equal voice in the assembly, and he is there in person to help in the making of laws and the appointment of magistrates; but the assertion that this democracy is immemorial and archaic is the statement of a theory, which, though it has been generally received, has never been established by any sufficient or satisfactory evidence.

It is the object of the following argument to show, — 1. That the theory of primitive democracy in the Alps has not been established by satisfactory evidence; that it cannot therefore be regarded as a contribution to historical knowledge; and, 2. That according to the accounts and records there was nothing of democracy in the political constitution of early Teutonic society. You will see that there were two classes of freemen, — the chieftains and their followers: that the office of chieftain was hereditary and also elective; not elective, however, by majorities of the electors, not elective upon democratic principles, but by individual choice, prompted by individual preference. The adherence of the followers to their respective chieftains was in all cases personal; and it was also voluntary unless the followers were dependents. You will see that the evolution of the political and economic institutions of the early Germans was directly towards feudalism, a social system based upon personal adherence and personal dependence.

I have just said that Mr. Freeman has given us no satisfactory evidence to show that the democracy of the Swiss Cantons is either immemorial or archaic, to show that it is an archaic political institution that has survived to our day. He tells us, in the first volume of his "Norman Conquest" (Cap. III. § 2, note), that he intends to treat the history of the democratic Cantons of Switzerland more at large in the second volume of his "Federal Government," and he says: "I will now only say that, though the amount of independence enjoyed by the ancient Cantons has been greatly exaggerated, there is evidence to show that, in some districts at least, the old Teutonic system can be traced back uninterruptedly as far as we have any records at all, so that we may fairly presume an unbroken succession from the Germans of Tacitus." The same argument is reiterated less concisely in the appendix of notes to the "Essay on the English Constitution." This is all the argument we have as yet received from Mr. Freeman. He intends to enlarge upon it in the second volume of the "Federal Government"; but the volume has not appeared, and we have no more promise of it. In the mean time we have a brief which we will proceed to examine.

Mr. Freeman tells us that we can trace the old system back a long way into the Middle Ages, that we may therefore presume an unbroken succession from the Germans of Tacitus. You will observe, in the first place, that Mr. Freeman assumes that it is the old system which we trace back in this way. He assumes that the present existing system is substantially the same as that which existed in the time of Tacitus, which is certainly something to be proved, and not to be assumed. Mr. Freeman should have said the present system may be traced back a long way into the Middle Ages. He should then have shown by a careful analysis and comparison that it is identical with that which existed in the time of Tacitus. Then he might have pointed out the probable connection between the two systems. But even then the argument would have been a very weak one; for, as you will observe, in the second place, Mr. Freeman admits that there is a gap in the records across which we are helped by inference and not by evidence. We trace, he says, the old system back into the Middle Ages, and presume that it goes back to the Germans of Tacitus. Of course the force or weakness of the argument depends upon the extent

of this gap between the mediæval records and the account of Tacitus. The greater the gap, the weaker the argument.

It happens that the first record containing any reference to the Canton Uri is of the year 732. Eto, the Abbot of Reichenau, was banished by the Duke of the Alamanni to Uri, — *in Uroniam.* (Monumenta Germaniæ. Scriptores, V. p. 98.) A document of 853 contains the words *pagellum Uroniæ*, and a reference to *homines tam liberos quam et servos.* The little canton, with its lands and people, churches and houses, is given by Ludwig the German to the cloister of nuns at Zurich. It appears as private estate, serving private ends, — *jure proprietatis et ad nostrum opus.* (See Neugart. Codex Diplomaticus, CCCXLIX., and also Rilliet's "Origines," p. 401.) The first record, however, which contains anything from which we can infer any organized and independent movement among the people of Uri is of a later date. It is of the year 955. It is a record in the archives of Zurich, given, however, in full in the appendix to Rilliet's "Origines de la Confédération Suisse." The inhabitants of Uri (*inhabitantibus Uroniam*), the dependents and tenants of the Fraumünster at Zurich, resist a proposed increase in their rents and dues, on the ground that it was for them, the people of Uri, to decide what additional rents and dues might be levied. It was a matter to be decided according to custom and law (*patrum nostrorum jure et lege*), not by the authority of the Abbess or her advocate. The custom or law referred to is probably that which we find in the Lex Alamannorum (Tit. XIII.). The freemen upon the estates of the Church, *quos colonos vocant*, paid to the Church the same rents and dues that the freemen upon the estates of the king paid to him.

You see that there is really no evidence in the document of 955 to establish the existence of communal or democratic institutions in Uri. All that we can infer from it is, that there was in Uri a group of men who had, by law, a certain right, which in the year 955 they were able to maintain against usurpation. (Compare Rilliet, p. 37.) It was not until the thirteenth century that Uri obtained what could be called political independence, and it was not until afterwards that the people had the right to choose their own magistrate, or *Landammann.* (Compare Bluntschli, Geschichte des Schweizerischen Bundesrechts, I. p. 28.) But

I will grant, for the sake of argument, that the democracy of the Swiss Cantons may be traced back to the year 955, not in its present developed form, but somehow or other as Mr. Freeman would have it. (See appendix of notes to the Essay on the English Constitution.)

If the earliest record in the history of communal or democratic institutions in the Alps dates in the year 955; and regarding the other Cantons beside Uri there are no records of so early a date from which we can infer any independent organization among the lower classes; if, as I say, the earliest record in the history of communal or democratic institutions in the Alps dates in the year 955, the middle of the tenth century, and the account of the Germans of Tacitus was written at the beginning of the second century, and there is no evidence to establish the existence of democratic institutions during the intermediate time, there is a gap of eight and a half centuries in the history of those institutions; and you will agree with me, I am sure, when I say that their continuity from the time of Tacitus to the present day cannot be established.

Mr. Freeman is inclined to admit, in his "Norman Conquest" (Cap. III. § 2, note), that in all but "a few of the smallest Swiss Cantons, and in several of these, the ancient freedom had to be reconquered, and was not uninterruptedly retained." He says that this was "altogether so" in Glarus and Appenzell and "in Uri to some extent." He does not tell us where it was not so. Still he insists that the democracy in the Alps, if not a survival, is at least a revival of the democracy which existed among the Germans in the time of Tacitus. And this seems to be Mr. Freeman's theory, divested of rhetorical exaggeration and reduced to simplest statement.

Granting that the political constitution of early Tentonic society was democratic, Mr. Freeman's argument is very weak, owing to the lapse of at least eight and a half centuries, probably more than twelve centuries, during which we have no records to show, either that the democracy of early times was surviving, or that the traditions of it were being preserved. If, however, the political constitution of early Tentonic society was not democratic, not at all like the constitution of the democratic Cantons of Switzerland, Mr. Freeman's theory will deserve no support, nor any further consideration.

I shall now proceed to lay before you, in as good order as I can and as briefly, the facts which we have which relate to the political organization of early Teutonic society. We must find out whether it was in any respect democratic, or not; we must find out, if we can, precisely what it was.

The first account we have of the Germans, at least the first account from which we learn anything with regard to the organization of society among them, is found in two or three chapters of Cæsar's Commentary "de Bello Gallico." The facts contained in these chapters are few and bare enough, but we have them from an original witness, and one of the highest character. Cæsar describes as the prime constituents of Teutonic society two classes of persons, — the chieftains, or *principes*, and the people; *gentibus cognationibusque hominum qui una coierunt.* In any nation of Germans there were numbers of chieftains, and the mass of the people were grouped under their leadership. We learn that in time of peace there was no common ruler over the chieftains, but they governed their followers more or less independently. Cæsar says of them (B. G., VI. 23): *inter suos jus dicunt controversiasque minuunt.* All this agrees with what Baed says of the Saxons (Hist. Eccl., V. 10). They had no king, but a great many rulers instead; *satrabas plurimos suae genti praepositos.* And what was true of the Germans in general in the time of Cæsar, and of the Saxons according to Baed, was true also of the Lombards after the death of King Kleph, at the end of the sixth century. As Paul the Deacon tells us in his History (II. 31): For ten years the Lombards had no king, but were governed by their dukes alone, and each of these ruled over his own city. In all there were thirty-six of them. The evidence, therefore, goes to show that in early times there were many chieftains in each nation of the Germans, and, when they had no common ruler, no king or chief of chieftains, they ruled over their followers more or less independently.

We know, however, that there were general or national assemblies in which the chieftains with their respective followers met together; and Cæsar tells us that in assemblies of this kind one of the chieftains would rise and propose an expedition, and invite others to join him in it, and those who approved of the man, and of the expedition he proposed, rose and promised to follow and

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NOTE OF ERROR.

The reading *ceteri*, for *ceteris*, in Germania, Cap. 13, is, I discover, an emendation. The MSS. reading is *ceteris*; which fact, of course, weakens my argument, as stated. The classification of the freemen (p. 12) holds good, however, which is the main point.

D. W. R.

Cambridge, October 8, 1880.

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obey. This invitation to join in expeditions was not extended to the mass of the common people; for, as Cæsar tells us (B. G., IV. 1), they were divided each year into two bands, and while one was led to war, the other was obliged to remain at home to superintend the cultivation of land, to provide the means of subsistence for themselves and those who were absent. *Sic neque agricultura nec ratio atque usus belli intermittitur.* There were many chieftains in each nation of the Germans, and they were constantly engaged in military expeditions, now under one leader, now under another. The chieftains governed their respective followers more or less independently, and when they were starting upon their expeditions they divided them into two bands, one of which they took with them, while they left the other at home. This is what we gather from the testimony of Cæsar.

Now we want to find out, if we can, whether the office of chieftain was elective or hereditary; and, as Cæsar has nothing to say about that, we will call up Tacitus. He tells us in his "Germania" (Cap. 13), that the right to be a chieftain was inherent in those persons who were of noble birth or distinguished parentage; *insignis nobilitas aut magna patrum merita principis dignationem etiam adulescentulis adsignant.* From which it appears that the right to be a chieftain was hereditary. But Tacitus goes on to say, that those who did not have the right to be chieftains, *ceteri*, the rest of the freemen chose among the chieftains the best; *robustioribus ac jam pridem probatis.* The freemen chose among the chieftains those whom they severally and individually preferred, and became their personal followers, their *comites.* This is what Tacitus tells us: from which it appears that the office of chieftain was elective. The chieftainship of the early Germans was hereditary and also elective; not elective, however, in the modern fashion, by majorities of the electors, but by their individual choice prompted by their individual preference. The chieftains were elected by divisions among the electors. Drop a number of magnets of different size and power among a lot of iron tacks, and you will see an election of the magnets by the tacks upon the old Teutonic principle. There were many chieftains in each nation, and among them the freemen were at liberty to choose those whom they individually preferred to follow and obey. The result of this was that the freemen were constantly

separating into groups, and each group had its chieftain; and the size of the group varied according to the attractive force of its leader. If he was particularly noble by birth, rich in land or stock, or distinguished for courage or success, he was sure to have many followers. If he was not particularly noble, nor rich, nor distinguished, he had very few. Tacitus tells us that the chieftains vied with one another as to which should have the most numerous and the bravest followers; *cui plurimi et acerrimi comites.*

This interpretation of the testimony of Tacitus is quite different from that which has been generally adopted. The prevailing opinion is, that, according to the account of Tacitus, there were chieftains who were elected upon democratic principles, who acted as representatives of the people; and each of them had about him a band of personal followers, as a sort of body guard. As Canon Stubbs says (Doc. Ill. of Engl. Hist., Introd., p. 3): The villages and cantons were governed by the *principes* appointed by the nation in its popular assembly. . . . . and the *principes* had the privilege of being attended by a train of *comites*, who fought for them in battle, waited upon them in peace, and regarded the honor of association with them as more than a compensation for such diminution of freedom as the relation of patron and dependent involved. The text of the Germania does not, however, admit of any such interpretation. If you will read the passage under discussion (the thirteenth chapter of the Germania), you will see that the word *ceteri* is used to describe those who did not attain to the dignity of chieftainship (*principis dignationem*), and the *ceteri* were the *comites*. And as to the words *principis dignationem*, they convey the meaning dignity of chieftainship, and no other. The translation which has been adopted by some writers, giving a transitive force to the word *dignatio*, as if it meant the right of having, instead of the right of being, a chieftain, is warranted by no usage known to classical or any other Latin with which we are acquainted.

The conclusion we reach then is, that there were two classes of freemen, — those who had the right to be chieftains and those who were the personal followers and companions of the chieftains. The right to be a chieftain was hereditary; but those who had not this right were at liberty to choose among the

chieftains those whom they personally preferred. Although the office of chieftain was hereditary, it did not *per se* involve the adherence of followers. The chieftainship was hereditary, but followers were not inherited with it. The adherence of the followers was in all cases personal. It was also voluntary.

This last statement must not be made, however, without a qualification. The adherence of the followers was in all cases personal, and it was voluntary unless the followers were dependents. We must divide the followers into two classes, — free followers and dependents.

We might infer, from what Tacitus tells us in his fourteenth chapter, that the followers were regularly dependent upon their chieftains for food and arms; but I cannot regard the statements in that chapter as strictly correct; for, in Chapter 13, Tacitus tells us that some of the followers got their arms from their fathers or kinsmen; as if by inheritance; and, in Chapter 20, he speaks of a law of inheritance, according to which all property was equally divided among sons or nearest kinsmen. Therefore some of the followers, probably many of them, had wealth of their own, and were not necessarily dependent upon their chieftains. There were two classes of followers, — those who were dependent upon their chieftains for food and arms, and those who had their own means of subsistence and self-defence; and it made a great difference in that early society whether a man belonged to one class or the other.

Tacitus tells us (Germ., Cap. 44) in a passage seldom quoted, but a passage that seems to me very significant, that among the Suiones, the Germans of the North, wealth was greatly esteemed, and that it followed from that that the chieftains could govern with no doubtful claim to obedience: *est apud illos et opibus honos, eoque unus imperitat, nullis iam exceptionibus, non precario iure parendi.*

The Visigothic Law (V. III. 1) reads as follows: If any one give his follower arms or anything else, and he, the follower, desires to desert his patron to choose another, he must first restore to him everything received by way of benefice. We see from this that if the Taciteau *comes* got his arms from his chieftain, he was not free to desert him until he gave them back. According to the ancient custom of the Lombards, as we learn from a capitu-

lary of the year 793, a freeman could commend himself to whomsoever he pleased; *De liberis hominibus Langobardis ut licentiam habeant se commendandi ubi voluerint.* So in the Edict of Rothar, the Lombard king (Sec. CLXXVII.), "A freeman can go where he pleases with his *fara* [*familia pecuniaque*], with the king's permission; but if he has received anything from his chieftain, or any one else, he must restore that to him or to his heirs." The phrase of Domesday Book (I. p. 175), *si ita liber homo est ut habeat socam suam et sacam suam et cum terra sua possit ire quo voluerit*, is significant in this connection.

These and other similar records testify, that among the followers there was a class of dependent persons, who got their arms and the means of subsistence from their respective chieftains; that they were bound in consequence of this indebtedness, not only to remain with their patrons, but to perform for them such services as were consistent with their rank or dignity. Compare the Capitulary of the year 815, Cap. VI. If a man was full-free, he was not to do, or, rather, should not be required to do, any servile work. Compare the Capitulary of the year 793: *De liberis hominibus ad servilia non cogendis;* and I may refer you also to the Sirmondi Formula, No. 44, to the words, *ingenuile ordine tibi servitium vel obsequium impendere debeam.*

You see that the freemen were divided into two classes, — the chieftains and their personal followers; and you see that the personal followers of the chieftains were divided into two classes, — those whose adherence was voluntary, who could desert their chieftains *ad libitum*, and those who were bound in dependence, who were not at liberty to desert their chieftains. These were the prime factors in the organization of early Teutonic society.

The clans and nations of men were confederations of more or less feudalized states, each under its chieftain; and a general or national assembly was a meeting of the chieftains, accompanied by their personal followers, voluntary and dependent.

Looking at the account of a general or national assembly among the early Germans, the account that Tacitus gives us in the eleventh chapter of his "Germania," and explaining it by the aid of modern political facts and modern political theories, we are inclined to say that the chieftains were the representative magistrates of the people. We are inclined to describe the assembly

as democratic in character. But the modern point of view is not the only point of view, it is not the right point of view.

Do we not read in the Law of Athelstan, the Anglo-Saxon king, (Ord. 2,) that every man had a lord in the *folkmoot?* Canon Stubbs, Mr. Freeman, and most of the German writers, would say that this came to pass in course of time. But do we not learn from Tacitus what we learn from this law of Athelstan? He tells us that those who were not chieftains took their choice among those who were, and became their personal followers. It appears, therefore, that the *folkmoot*, or popular assembly, in the time of Tacitus, was — what it was in the time of Athelstan — an assembly of chieftains accompanied by their personal adherents.

The philologists tell us that the German word *König*, our *king*, corresponds with the Sanskrit *ganaka;* and this signifies the father of a family. (See Max Müller, Science of Language, II. 284.) This is a text for us, pointing to the fact that the kingship or chieftainship of early times is rooted in the idea of paternity and paternal authority. The authority of the king or chieftain is primarily the authority of the father or the patriarch: and we may say that, among the branches of the Aryan race at least, the tap-root in the history of institutions is the *patria potestas.* It was an absolute authority, not over wife and child simply, but over followers in dependence, and slaves in servitude. The father of the family was its sovereign ruler; and the clans and the nations of men were associations of families bound together by the blood relationship of their heads. This blood relationship was the sole bond of their confederation; and we have what Mr. Grote has very happily described as the omnipotence of private force, tempered and guided by family sympathies. In the course of time, however, certain families became eminent above others by reason of their success in the struggle for existence. The movements of these families at first determined, and afterwards governed, those of all the other families with which they were in any way associated; and the members of such prominent families became the leaders and the rulers of their fellow-men, as their chieftains or their kings; and the authority of these chieftains or kings was the authority of heads of families, which was the only sort of authority known to that early society, passing beyond the limits of families over bands of personal and voluntary

adherents. It was an absolute authority, tempered only by the independence and liberty of those over whom it was exerted. It was a sovereign authority struggling under adverse conditions.

It was a sovereignty, limited by competition. There were numbers of chieftains in every nation, and the people were free to transfer their allegiance from one to another; the result of which was, that the competition among the chieftains to get and retain the greatest number of devoted adherents caused their authority over these adherents to sink to a minimum. The real character of that authority is revealed only in the course of time, when this competition ceased, in consequence of the spread of dependence, of settled life and local attachment; or as the result of agreement among the chieftains in opposition to the independence and liberty of those whom they governed.

In the year 587, the Frankish kings Guntram and Childebert agreed that they would not attempt to allure one another's followers from their allegiance. They would neither persuade them to desert, nor receive them if they did so: *similiter convenit ut nullus alterius leudes nec sollicitet nec venientes excipiat.* As if our capitalists should agree not to solicit one another's workmen, nor to employ them should they come seeking labor. As if our great land-owners should agree not to receive one another's tenants, should they present themselves and ask for leases of land. If such events should come to pass, the power of the capitalist and the landlord would be revealed to our amazement. So it was with the kings and chieftains of early times. So long as the competition among them to obtain the greatest number of devoted adherents was unchecked, their authority was kept at a minimum. But when this competition ceased, great powers, which had been latent before, became apparent to the world in the feudal monarchy of the Middle Ages.

The aim of the student who pretends to work in a scientific way is first to attain a point of view embracing all ascertainable facts in their natural and true relationship, and then to lead others to that point of view. So now, if you have followed me through my argument, and if I have led you to comprehend the facts we have which relate to the political organization of early Teutonic society, we are prepared to reconsider together Mr. Freeman's picture of free institutions in the Swiss Cantons, and

we are prepared to declare at once that it will not serve to describe the political organization of Teutonic society as revealed in the earliest accounts and records.

In early times the office of king or chieftain was hereditary. The office of magistrate in the Swiss commonwealth is elective. The elections take place periodically, and are accomplished by the concurrence and agreement of a majority of the electors. The early kings and chieftains were also elected; not, however, by majorities of the electors, but by divisions among them. Every freeman, who was not a dependent, chose among the kings or chieftains the one whom he personally preferred, and remained with him, under his leadership and government, as long as he pleased, and no longer. The government of the early kings and chieftains was paternal or monarchical, in early times rather paternal than monarchical, in later times the reverse of this. In either case the authority emanated from the persons who exercised it, and not from the persons over whom it was exercised. In the Swiss commonwealth, on the contrary, the chief magistrate is the representative of the people. It is their sovereignty, and not his own, that he administers. And as to the law; in early times it was the voice of the fathers, of the chieftains, of the kings, while in the modern democracy it is the voice of the people as a legislative body.

In no respect do we discover any resemblance between the constitution of the democratic Cantons of Switzerland and the political organization of early Teutonic society: and it follows that the constitution of the Swiss commonwealth is not an archaic political institution that has survived to our day; but an institution which has come into being within comparatively recent times. Its origin is not pre-historic, not archaic, but mediæval. Particularly what it was will be a subject for future investigation.

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